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HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 496

NATIONAL LAWYERS GUILD,

Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia granting a motion for summary judgment and dismissing petitioner's complaint.

The Opinions Below

The opinion of the Court below has not yet been officially reported. A copy of the opinion and judgment is hereto annexed as Appendix A (pp. 21-32, *infra*).

Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered on July 14, 1955.

2. Timely application for rehearing was made, which was denied on October 4, 1955.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1254.

Questions Presented for Review

1. Must a bar association threatened with a listing by the Attorney General as an organization within the purview of Executive Order 10450 exhaust the administrative remedies prescribed by the Attorney General when:

(i) There are substantial questions as to whether:

(a) The Attorney General has constitutional power to list;

(b) The administrative proceedings lack due process and violate the Administrative Procedure Act;

(c) The Attorney General has prejudged the case: and

(ii) The association will suffer irreparable injury should it be listed and there is grave danger it would not survive to obtain judicial review of a listing order; and

(iii) In order to obtain an administrative hearing the association is required to answer burdensome and oppressive interrogatories, many of which cannot be answered and many of which invade the privacy and constitutional rights of the association and its members.

2. Is Executive Order 10450, in so far as it authorizes the listing of organizations thereunder, constitutional on its face and as applied to petitioner.

Statutes and Regulations Involved

There is no statute governing the action of the Attorney General. The pertinent provisions of Executive Orders 9835 and 10450 and the regulations issued thereunder are set forth *infra* at pp. 33-43 in Appendix B.

Statement of the Case

The petitioner is a national bar association, which was founded under distinguished auspices in 1937 (II J. A. 70-71).* Since its inception it has engaged in activities traditional to bar associations, seeking in numerous respects to enhance the standards and economic status of the legal profession, to advance the administration of justice, to aid in making legal services available to low income groups, to improve substantive and procedural law, to protect American democratic institutions and the constitutional rights of all, and to promote international amity. Petitioner files amicus curiae briefs, releases studies and reports, submits testimony and recommendations to legislative committees, including recommendations on judicial appointments, holds conferences and meetings, takes positions on legislation and other questions of public importance, and publishes the periodical, "The Lawyers Guild Review."

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*The record includes two joint appendices filed in the court below, one on the appeal from the denial of the preliminary injunction (in which petitioner prevailed), the other on the appeal from summary judgment for respondent. We use "I J. A." to refer to the joint appendix filed on the first appeal (No. 12059 below), which was incorporated by reference into the joint appendix filed on the second appeal (No. 12495 below). We use "II J. A." to refer to the latter joint appendix.

The only prerequisite to membership in petitioner is membership in the bar. Petitioner never has conditioned membership on sex, race, color, or religious or political belief or affiliation (I J. A. 3-4; II J. A. 72-109).

In March 1947, President Truman issued Executive Order 9835, establishing the government employees' loyalty program. The Order provided that the Attorney General should designate, "after appropriate investigation and determination," organizations described as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

Executive Order 9835 was superseded by Executive Order 10450 ("Security Requirements for Government Employment"), issued by President Eisenhower in April 1953. The new order, however, continued the Attorney General's function of designating organizations of the character described.

Membership in an organization designated by the Attorney General adversely affects the eligibility of any person for federal employment. Connection with such an organization is officially considered "one piece of evidence which may or may not be helpful" in determining whether a government employee or applicant for employment meets the government's "loyalty" and "security" standards (see 5 C. F. R., App. A, p. 200; 13 F. R. 1471-3; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 205, ftn. 23). In addition, the Attorney General's list has come to be widely used in determining that members of designated organizations are ineligible for numerous privileges, including various private and non-federal government employment, occupancy of federally-aided housing projects, etc.*

* See Appendix C, *infra*, pp. 44-49.

Although the government employees loyalty and security program, including the designation of organizations by the Attorney General, has been in effect since 1947, the petitioner has never been designated as a proscribed organization. No suggestion of a designation of petitioner was made by Attorneys General Clark, McGrath or McGranery, the predecessors of the incumbent Attorney General.

The organizations so far placed on the Attorney General's list are there without having had a hearing. Originally, no provision for hearing was made. Following the Court's decision in the *Joint Anti-Fascist* case, *supra*, holding that a designation was subject to judicial review and casting doubt on the validity of designation without hearing, the Attorney General issued regulations (18 F. R. 2619; see *infra*, pp. 38-43) which purport to establish a notice and hearing procedure prior to designation.*

Under these regulations, the first step in designating an organization is for the Attorney General to notify it of his intention to designate it. If the organization replies that it desires to contest the designation, it is served with charges (a statement of grounds) and possibly with interrogatories. If it answers these, an administrative hearing may follow.

On August 28, 1953, petitioner received a notification that the Attorney General intended to designate it under Executive Order 10450. It first learned of the proposed action, however, from press reports of a speech made by the Attorney General on August 27, 1953, in Boston, before the annual convention of the American Bar Association (I J. A. 6). In this speech the Attorney General vehemently denounced petitioner. He started out by stressing the "most thorough investigation and study of all the evi-

* Organizations which had theretofore been designated were left on the list, but were given an opportunity under the regulations to avail themselves of an administrative procedure to challenge the designation.

dence" which precedes a designation and the responsibility he had of making public the "fact" of alignment with Communism (II J. A. 19). Then he said that he had studied the facts about petitioner "with great care." Immediately thereafter he stated: "I am now prepared to make this *determination* public" (II J. A. 19) (emphasis ours).

He continued: "It has been clear that at least since 1946 the leadership of the Guild has been in the hands of card-carrying Communists and prominent fellow-travellers" (II J. A. 19-20). And finally he said that he served notice on petitioner to show cause: "because the evidence shows that the National Lawyers Guild is at present a Communist dominated and controlled organization" (II J. A. 20). He stated that he had determined that the petitioner is a "Communist dominated and controlled organization fully committed to the Communist Party line." He said that petitioner is "the legal mouthpiece for the Communist Party and its members, and it has consistently opposed all laws or investigations which have sought to curb or expose Communist activity in the United States." He announced that he had that day served notice on petitioner "to show cause why it should not be designated on the Attorney General's list of subversive organizations."

A few days later, on September 5, 1953, some six weeks before petitioner received charges from the Attorney General in accordance with his regulations, the Attorney General stated "charges" against petitioner in another public speech, this one made in Indianapolis to a convention of American Veterans of World War II (I J. A. 6). In this speech, the Attorney General stated that his designation of organizations "makes it possible for uninformed loyal citizens to disassociate themselves from such groups at the earliest possible moment." He then renewed and elaborated the attack he had made on petitioner before the American Bar Association. He repeated his accusations that the petitioner was controlled by, and the "legal mouthpiece" of, the Communists. He also stated in detail what would

"shortly * * * be specifically charged" against petitioner. Illustrative of these charges were the assertions that a member of petitioner "appeared as defense lawyer for Valentin Gubitchev, the Russian charged with spying against the United States in the Judy Coplon case"; and that the petitioner had "attacked", among other things, the Smith Act prosecutions and the non-Communist affidavit of the Labor-Management Relations Act. In support of his accusation that petitioner followed the Communist Party line, the Attorney General said (I J. A. 23):

> "I would like also to give some examples of how the Guild has followed the Communist Party line. In 1950, the 'Daily Worker' attacked the New York City Board of Education trial of a school teacher accused of being a Communist. The 'Lawyers Guild Review' reports a resolution by the Guild deploring continued attacks upon intellectual freedom of students and teachers."

He repeated much of what he had said in his earlier speech and went on to elaborate. Thus he said with respect to petitioner:

> "* * * It has become more and more the legal mouthpiece of the Communist Party and its members. It has consistently opposed all laws or investigations by which the freedom-loving people of this country have sought to curb or expose Communist activity in the United States" (II J. A. 26).

And he continued, saying:

> "As an organization, the National Lawyers Guild has interceded in practically every major case involving the Communist Party, its officials, and its front organizations. In every instance, these intercessions were on behalf of the Communists" (II J. A. 27).

The full text of those portions of the Attorney General's speeches which refers to petitioner are set out in full as Appendix D, *infra*, pp. 49-53.

The attacks made in these two speeches by the Attorney General upon petitioner received wide publicity, and the Attorney General caused copies of the speeches to be distributed to the press and the public (I J. A. 7).

Without waiving its legal objections, petitioner filed a written notice of contest of the proposed designation in accordance with the Attorney General's regulations. On November 17, 1953, petitioner received the Attorney General's statement of grounds. These charges (I J. A. 23-25), as well as the notice of intention to designate petitioner, fail to state which category of organizations is claimed to apply to petitioner, i.e., whether "totalitarian, fascist, communist or subversive," etc.

With the statement of grounds, the Attorney General propounded to petitioner a set of interrogatories. The Attorney General's regulations provide in this respect:

> "Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers" (Sec. 41.3, p. 40 *infra*).

The petitioner applied to the Attorney General to eliminate or modify the interrogatories, alleging that they were beyond his power and an abuse of process, and that specified interrogatories were irrelevant, burdensome, vague, or an invasion of privacy (II J. A. 41-42). The Attorney General thereupon served an amended, but virtually identical, set of interrogatories, having made a few trivial changes (cf. I J. A. 44-64 with II J. A. 46-65).

The amended interrogatories (II J. A. 46-65) are set forth under 64 numbers, broken down into 105 parts, many of which ask for numerous items of information. They range over the history of the petitioner since its inception in 1937, and seek exhaustive and often vaguely defined

information concerning petitioner, its chapters, its past and present members, and its relations of any kind with the over 200 organizations already proscribed by the Attorney General. In this respect, it should be noted that many thousands of lawyers have at one time or another been members of petitioner. Petitioner has had approximately 30 chapters, most of which are now inactive or defunct. The chapters kept their records locally, and their records are not in the possession of petitioner's national office. As to defunct chapters, it is not known whether the records are still in existence. Answering the interrogatories in any reasonably complete fashion would be extremely onerous and burdensome, entailing a huge effort and expense in research, investigation, analysis and compilation (I J. A. 27-29).

Furthermore, many of the interrogatories are impossible, or virtually impossible, to answer, even assuming that all past records can be located and searched. Many of the interrogatories relate to matters, often vaguely defined, which are not the kind which would be normally recorded.* Others relate, often in vague terms, to affairs, actions, and associations of petitioner's members, present and past, living and deceased, concerning which petitioner could not be reasonably expected to have or be able to acquire knowledge.** The interrogatories would require petitioner to conduct its own "loyalty" inquisition of present and former members, and inform on possible "delinquents" to the Attorney General.*** They demand a listing of petitioner's membership,**** and generally seek to inflict a gross invasion of privacy.

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* E.g., Interrogatories 5, 7, 8(a), 25, 26, 28, 41, 48, 50, 51. (References in this and the following paragraph are to the amended interrogatories, which are collected at II J. A. 46-65.)

** E.g., Interrogatories 5, 6(b), 7, 8(c), 10, 42(b), 48, 49.

*** E.g., Interrogatories 10, 42(b), 49.

**** Interrogatory 42.

In short, the interrogatories are designed to make answering impossible, and thus to lay a foundation for the default designation authorized by the Attorney General's regulations for failure to answer or for "evasive" answers.

In addition, the interrogatories manifest prejudgment.* They also indicate that the Attorney General's standards are, to an extreme degree, imputation of guilt by association,** guilt for differing with administration views and policies,*** and guilt for not being rabidly anti-Communist.**** The same characteristics are manifested in the Attorney General's statement of grounds (I J. A. 23-25), as they were in the speeches he made in Boston and Indianapolis.

Under the Attorney General's regulations, even if interrogatories are hurdled by answers which are not treated as a default, a hearing does not necessarily follow. The regulations provide that the proceeding may be conducted without the taking of evidence if the hearing officer deems on the basis of the charges, reply, interrogatories, and answers that a determination may appropriately be so made. If a hearing is held, the burden of proof is on the accused organization. For the regulations provide that the Attorney General may rely exclusively upon his statement of grounds, need not introduce evidence, or may introduce only rebuttal evidence. The Attorney General is authorized to introduce as evidence information "in summary form or otherwise" consisting of statements or other material from unidentified informers and sources. The Attorney General may, therefore, make a determination adverse to an organization on the basis of matter not of record and information from unidentified persons whom

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* E.g., Interrogatories 16, 17, 18.

** E.g., Interrogatories 7, 8(c), 10, 25, 26, 27, 28, 42(b), 47(b), 49(a).

*** E.g., Interrogatories 17, 18, 19, 21, 22, 30, 31, 32, 36, 37, 64.

**** E.g., 15(a), 17, 18, 31, 39, 40, 64.

the organization has had no opportunity to confront or cross-examine. Furthermore, as we have seen, failure to answer any interrogatory or charge or filing of an "evasive" answer may be taken as an admission.

Petitioner filed suit in the District Court, seeking to enjoin the Attorney General from designating petitioner under Executive Order 10450. The suit also sought a declaratory judgment that the provisions of Executive Orders 9835 and 10450 for designation of organizations are invalid; that the Attorney General's regulations respecting the designation of organizations are invalid; and that by reason of his expressions of prejudgment the Attorney General was disqualified from proceeding against petitioner. The complaint denied that petitioner was an organization within any of the categories of Executive Orders 9835 and 10450 (I J. A. 1-25).

In support of a motion for preliminary injunction and in opposition to the respondent's motion for summary judgment, petitioner filed detailed and uncontradicted affidavits that it had suffered irreparable injury from the institution of the proceeding to designate it, and that it would continue to suffer such injury in aggravated form if the proceeding were allowed to continue. This injury included loss of membership and revenues, damage to petitioner's reputation, restriction on the free expression of opinion by petitioner and its members, and interference with public acceptance of petitioner's program and publications. The affidavits also showed that the shock of an unfavorable decision in the administrative proceeding might well cause the destruction of petitioner before it could avail itself of judicial review of a final administrative order (I J. A. 12, 29, 64-67; II J. A. 69-109).

The District Court denied petitioner's motion for a preliminary injunction, and the Court of Appeals reversed on the ground that "the interests of justice would be served best in this matter if the administrative hearing were held

in abeyance pending the judgment of the District Court upon the merits of the issues posed in the action." *National Lawyers Guild* v. *Brownell*, 215 F. 2d 485.

When the case returned to the District Court, the Attorney General moved for summary judgment. In support of the motion, he filed his affidavit disclaiming prejudgment and affirming an intention to make an impartial determination in the administrative proceeding (II J. A. 109-112). The District Court granted summary judgment on the ground that petitioner had failed to exhaust its administrative remedies. The Court of Appeals affirmed on the same ground. Respecting the interrogatories, it stated:

> "Some further revision of these questions is probably in order. For example, some of the amended questions appear to be extremely difficult, if not impossible, of answer."

However, ignoring the fact that the Attorney General had already denied petitioner's application for correction of the interrogatories (II J. A. 44-46), the Court added:

> "We think the proper place to test these interrogatories in the first instance is before the administrative body. We cannot anticipate the administrative action, if such a step were taken * * *."

The District Court's jurisdiction arose under Sections 11-305 and 11-306 of the D. C. Code. The Court of Appeals had jurisdiction under 28 U. S. C. 1291.

The petitioner has not yet filed with the Attorney General answers to either the statement of grounds or the interrogatories. The Department of Justice has agreed that such answers may be held in abeyance, without a default designation being made, pending disposition of this petition for certiorari.

Reasons for Granting the Writ

It is, of course, an important and serious question whether the Attorney General may constitutionally designate organizations as "subversive" under the federal employee security program. So much is abundantly clear from the various opinions in the *Joint Anti-Fascist Refugee* case, *supra*. Second only in importance to this question is the validity of the Attorney General's procedures in making the designations. The power to designate is virtually a power to destroy by governmental stigmatization. We assert that this power does not exist. But if it does, surely there are restrictions on the method of its exercise.

One of the questionable elements in the Attorney General's procedures is his asserted authority to condition the availability of a hearing on the furnishing of satisfactory answers to such interrogatories as he sees fit to demand. This case squarely raises that question, and it cannot be premature. The interrogatories served on petitioner were a gross invasion of privacy, and the answering of them would itself be the incurring of an onerous governmental sanction. Petitioner must be able to challenge the validity of the interrogatories before it answers them. Otherwise it loses the privacy which it may have a right to protect and suffers the harm from which it may have a right to be preserved.

Nor is the exhaustion doctrine applicable to frustrate petitioner's challenge of the designation power itself and of other aspects of the Attorney General's procedures. In the first place, there is not here involved, as in the normal exhaustion situation, a statutory authority or a statutory review procedure which a litigant seeks to short cut. Secondly, the constitutional power to act is itself challenged, whereas the traditional exhaustion cases primarily involved questions of coverage or interpretation which should be initially left to administrative determination.

Thirdly, the administrative proceeding has been prejudged by the Attorney General's public speeches in Boston and Indianapolis attacking petitioner. Fourthly, the administrative process is grossly inadequate. The procedures of the Attorney General are a caricature of due process. So far from granting a hearing, they invite default. If by the Attorney General's grace a hearing is nevertheless obtained, it is a sham, involving faceless informers, misplacing the burden of proof, and utilizing irrational criteria. No organization, least of all a bar association, should be compelled to undergo such a humiliating and unfair procedure, particularly when the power of decision rests with one who has already publicly announced his prejudgment. Nor is the cause and reputation of justice served by withholding judicial relief in deference to such a hearing before an arbiter who has already rendered his public decision.

Finally, the petitioner is suffering irreparable injury to constitutionally protected interests now, and this injury will be magnified by a continuation of the administrative process. The rule of comity, created by a sense of judicial restraint and always recognized to be subject to exceptions, must yield to the obligation to vindicate constitutional right. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 773, 774; *Eccles* v. *People's Bank*, 333 U. S. 426, 434. Moreover, if petitioner cannot obtain relief now, it is likely to be deprived of it altogether. For it may well be destroyed by the administrative process before it can secure review of the administrative order.

The Attorney General originally asserted the power to designate (and thus to destroy) organizations without even the semblance of a hearing. This case proves that his regulations are a device to maintain the same despotic power, while creating on paper an illusion of a hearing procedure so as to stave off judicial review until it is too late to be of value.

In the case of petitioner, there are particularly compelling reasons why it should not be remitted to the adminis-

trative procedure. The interrogatories do not merely invade organizational privacy, but also infringe the independence of, and intimidate, the bar. The same effect will result from the damage which will be inflicted on petitioner by a continuation of the administrative process.

The court below has decided important federal issues which have not been and should be decided by this Court, and has misconceived the effect of earlier decisions of this Court.

1. The court below expressed the view that this Court, in the *Joint Anti-Fascist* case, *supra*, had ruled that the administrative proceeding must be exhausted before judicial relief was available. It based this view on the fact that various Justices of this Court, in their opinions, had stressed the need for hearings. Said the court below: "And implicit in their opinions is the premise that the listings were not invalid for total lack of power in the President and the Attorney General."

We respectfully submit that this is an erroneous view of this Court's decision which requires elucidation by this Court. We believe, as we pointed out to the court below in our application for rehearing, that this Court intended to express no opinion whatever on the power of the President to authorize this listing process, in line with the principles enunciated in cases such as *United States* v. *Rumely*, 345 U. S. 41, and *Peters* v. *Hobby*, 349 U. S. 331.

The court below also relied on this Court's decisions in *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868, and *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, in support of its holding that petitioner must exhaust his administrative remedies. But those cases do not touch the problem here presented. The rule of those cases is the familiar one that an attack on the constitutionality of an Act of Congress will not be considered until the remedies provided for by that Act have been exhausted—largely out of this Court's concern for not overturning Congressional

enactments until absolutely necessary. Here no Act of Congress is involved. We are concerned with an attack on executive power, claimed to be a usurpation and an infringement of liberty. In such a case the question of exhaustion should not arise.

Moreover, in the *Allen* case this Court recognized that the doctrine of exhaustion does not apply unless the administrative proceeding has been validly authorized. In other words, the Court must determine for itself whether that is the case. The Court in that case determined that the administrative proceeding had been authorized by an Act of Congress. Here no such Act of Congress can be relied upon to support the administrative proceeding.

This Court has always been astute to redress infringements by executive authority, including that of the President, from *Ex parte Milligan*, 4 Wall. 2, to *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

Petitioner urges the importance of not having to exhaust the administrative process because of the great likelihood that if unsuccessful there it could not survive to carry the legal issues to the courts. Lawyers are particularly sensitive, especially in times like these. Their professional careers would be seriously affected by an official branding of subversion, no matter how unjustified in fact and despite the unconstitutionality of the action and procedure resulting in the branding. The injury is not only to petitioner and its members but also to the public which is deprived of the benefit of its contribution to the discussion of legal issues and its participation in efforts to solve the problems of our times. The injury extends beyond this into the realm of freedom of expression, for the injury to petitioner must of necessity curtail or destroy its publications, its quarterly review, its pamphlets, reports and briefs.

2. The court below appears to have readopted its own earlier view in the *Joint Anti-Fascist* case (177 F. 2d 79,

84) that the Order was valid. Such a "flat" holding, if allowed to stand as a precedent, certainly calls for consideration by this Court. There can hardly be a more important or far-reaching subject than this.

Petitioner's attack on the power of the Attorney General to list rests on a double basis: to give any official of the government such power of blacklist violates First Amendment rights; the standards under which the power is exercised violate due process. As it has proliferated far beyond its original purpose, the listing of an organization is an official branding tantamount to a death sentence.

A blacklist once published by government authorization is public property and can be used by anyone for any purpose. Since it bears the badge of official sanction it can be cited with authority, and it carries much greater weight than a private compilation. For this reason the use of the Attorney General's list—originally designed to serve merely as a guide to federal agencies in screening personnel—has been widespread beyond belief. It has been used by state, county and municipal authorities to screen local employees; it has formed the basis of undesirable discharges from the armed services; it has been used to deny applications for public housing and for state and local licenses, and it has become an element in registration requirements under municipal law. Textbooks have been removed from schools and public libraries when their authors have been found to be members of listed organizations. Employment in defense plants, in radio and television, and in many areas of private industry has been made to depend upon denial of membership in listed organizations. (Appendix C, pp. 44-49, *infra*, gives many specific examples of the extensive use of the list.) The right to free association is an empty right indeed when exercised under the threat of these sanctions.

Particularly is that the case where, as here, the standards are so hopelessly vague. Terms such as "communist",

"subversive", are devoid of legal meaning. Their inclusion in the standards vitiates them—at least that is so in the case of petitioner since the Attorney General claims the right to list it as "communist" and, in his speeches, called it "subversive". Moreover, an examination of the Statement of Grounds and the Interrogatories shows the far reach of the claimed power. Even the filing of briefs amici in this Court on issues of grave constitutional import (and this Court decided some of those cases in the way urged by petitioner) is cited as evidence of communist domination.

Surely the time has come for this Court to deal with the issue on a comprehensive basis and put an end to one of the worst aspects of the current mania for guilt by association. Further delay will, as the late Justice Jackson pointed out, merely cause further damage:

> "Such delays often mean that the damage is done before the remedy for invasion of civil liberties is available. For example: In 1951 the Court cast serious doubt upon the legality of the Attorney General's list of subversive organizations promulgated in 1947. But the list had long been widely circulated and accepted, and despite the Court's views it has never ceased to be used in the press, in the executive department, by and before congressional committees, and even in courts to prejudice individuals in their liberty, position, and good name."
>
> [The Supreme Court as a Unit of Government, p. 25.]

3. The court below brushed off petitioner's claim of prejudgment by reference to this Court's decisions in *Marcello* v. *Bonds*, 349 U. S. 302; *Shaugnessy* v. *Accardi*, 349 U. S. 280, and *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683. It suggested that this Court had decided "that decision upon alleged prejudgment must await the presentment of proof of effect". We believe that to be a misreading of this Court's decisions. Actually this Court did not decide that the claims of prejudgment there made

in those various situations must await the outcome of the administrative proceeding. It ruled only that, under the particular circumstances, no relief was available.

Thus in *Marcello* this Court made it clear that it considered that no case of prejudgment had been made out. In *Accardi* a hearing had been held at which the fact of prejudgment was litigated and a finding adverse to the claim made by the District Court. This Court merely held that the Court of Appeals could not disregard such a finding. Here there has been no hearing—merely a determination based on the Attorney General's self-serving disclaimer.

Finally, the *Cement Institute* case decided only that where Congress had vested a particular tribunal with a duty and made no provision for challenge to its members, a court could not interfere. There is no similar situation here, since the President could designate some other officer of government to conduct a hearing. Moreover, the alleged prejudgment there was based on opinions expressed on legal rather than factual matters.

Here we have an entirely different situation. It cannot be glossed over as the Attorney General seems to do by stating that the speeches from which we have already extensively quoted indicated merely the existence of evidence warranting further proceedings. Had this case followed the normal procedure we should not have raised the issue. But this was no mere announcement of an intention to file a complaint or even an indication of the nature of the charges. Here all of the circumstances require a finding of prejudgment. Certainly there can be no basis for a finding such as was made by the District Court and sustained by the court below that as a matter of law there was no prejudgment.

No case has been presented in which it has been held that a hearing could properly be conducted by an official who

had expressed himself in the strong terms used by the Attorney General with regard to this petitioner. Surely this situation calls for intervention by this Court.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12495

NATIONAL LAWYERS GUILD, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided July 14, 1955

Mr. Osmond K. Fraenkel, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. Benjamin Forman, Special Assistant to the Attorney General, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Mr. Leo A. Rover*, United States Attorney, and *Mr. Samuel D. Slade*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Paul A. Sweeney*, Attorney, Department of Justice, also entered an appearance for appellee.

Before PRETTYMAN, WILBUR K. MILLER, and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellant is a national bar association which has been in existence since February, 1937. On August 28, 1953, it received a letter from the Attorney General of the United States, stating that he proposed to designate it as an organization coming within the purview of Executive Order 10450.[1] The Guild filed formal notice that it desired to contest the proposal,[2] and the Attorney General sent the Guild a statement of the grounds upon which the designation was proposed. The statement was accompanied by sixty-six interrogatories to be answered by the Guild.[3] The Guild then filed in the District Court a complaint for injunctive relief. It prayed judgment declaring that Executive Orders 9835 and 10450 are unconstitutional and void, the procedures adopted by the Attorney General under those orders are unconstitutional, and the Attorney General is disqualified to rule in this case by reason of prejudgment of the issues. It further prayed for an order enjoining the Attorney General from designating it under Executive Order 10450.

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[1] 3 C.F.R. 72 (Supp. 1953), providing in pertinent part: "SEC. 12. * * * the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency." Paragraph 3 of Part III of Executive Order No. 9835, 3 C.F.R. 129, 131 (Supp. 1947), provides: "The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

[2] Pursuant to 28 C.F.R. § 41.1(b) (1954).

[3] Pursuant to 28 C.F.R. § 41.2 (1954).

Having filed its complaint the Guild moved for preliminary injunction and filed affidavits in support of its motion. Attached to one of the affidavits were copies of the interrogatories served by the Attorney General. The District Court, after hearing, made findings of fact and conclusions of law and denied the preliminary injunction. The Guild appealed to this court, and we reversed the order of the District Court, remanding the case with directions that an order be entered holding in abeyance the administrative proceeding pending the judgment of the District Court upon the merits of the issues posed in the action.[4] Thereupon the Attorney General filed in the District Court an answer and a supplemental answer to the complaint, with exhibits attached to each answer. He then filed a motion for judgment on the pleadings or, in the alternative, for summary judgment. The Guild filed a long affidavit in opposition. The District Court heard the motion, filed a memorandum opinion,[5] made findings of fact and conclusion of law, and granted summary judgment for the defendant. The present appeal by the Guild followed.

The first point presented by the appeal is whether the issue of exhaustion of administrative remedies was open for consideration by the District Court, in view of the opinion, decision and order of this court upon the first appeal. We think that issue was plainly open for consideration; it was one of the merits posed by the pleadings in the action. A motion for a preliminary injunction requires the court to determine whether there are substantial questions and whether there would be irreparable injury to one party or the other, and to balance the equities between the parties. Those, and those only, were the considerations upon which this court acted in its re-

[4] National Lawyers Guild v. Brownell, ... U.S. App. D.C. ....., 215 F. 2d 485 (1954).

[5] National Lawyers Guild v. Brownell, 126 F. Supp. 730 (1954).

view of the denial of the preliminary injunction. By his subsequent pleadings the Attorney General posed as a basic issue that the Guild must exhaust its administrative remedy before obtaining judicial review. Thus that issue became one upon the merits of the prayer for permanent injunctive relief. As such, it was open for consideration upon the motion for summary judgment.

The second question upon this appeal is whether the District Court erred in ruling that the Guild must exhaust the administrative remedy provided by the Attorney General's rules of procedure. The Guild says it is not required to do so and assigns a number of reasons. These reasons are that the Attorney General has prejudged the matter, no statute authorized the procedure, there is no constitutional basis for the executive action, irreparable injury would ensue from pursuing the remedy, the procedure violates the requirements of due process, and the Executive Order (No. 10450) is void for lack of definite standards.

The Guild says the District Court erred in its ruling upon the allegation of prejudgment. It was shown by affidavit that, on August 27, 1953, coincident with the notice sent the Guild, the Attorney General delivered an address before the American Bar Association in Boston, in which he made strong statements as to his reasons for proposing to designate the Guild, and he delivered another similar address at Indianapolis on September 5, 1953. The extract from the Boston address which was filed as an exhibit concludes with the following sentence: "It is because the evidence shows that the National Lawyers Guild is at present a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations." Similarly positive statements appear elsewhere in the extract from the address.

The applicable rules of procedure,[6] promulgated by the Attorney General pursuant to Executive Order 10450, provide that an "appropriate investigation" must precede a proposal to designate an organization as within the purview of the Order; that, if he proposes to designate, the Attorney General must send a formal notice and, if a contest is filed, he must send a written statement of grounds. If no contest is filed the proposal ripens into a determination. Thus it is required that the initial proposal to designate be after investigation and upon grounds; in other words, it must not be a mere opening move without substance. While one might question the propriety of the vigorous statements made publicly by the Attorney General in the case at bar, at the same time it should be recognized that he may well have felt that "a decent Respect to the Opinions of Mankind" required him to disclose personally at the bar of public opinion the reasons for proposing the designation of a national bar association. The proposal to designate such an organization was a unique and serious step, not to be taken lightly. We have in this record an affidavit of the Attorney General, vigorously denying his prejudgment and explaining that the only determination thus far made by him is that the evidence warranted his proposal to designate, a preliminary and *ex parte* determination. He reaffirms under oath his intention "to make an impartial final determination on the basis of the administrative record before me".

We cannot assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it.

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[6] 28 C.F.R. § 41.1 *et seq.* (1954); and see Joint Anti-Fascist Refugee Committee v. Brownell, ____ U.S. App. D.C. ____, 215 F. 2d 870 (1954).

It is to be noted that in *Marcello*,[7] *Accardi*,[8] and *Cement Institute*[9] the Supreme Court treated the developments at the administrative hearings as determinative of the issue of claimed prejudgment. Implicit in that treatment is the thought that decision upon alleged prejudgment must await the presentment of proof of effect.

The appellant Guild next says that it is not required to exhaust the administrative remedy set up by the regulations, since the administrative listing of organizations has not been validly authorized. It says the President lacked power to authorize the listing and the standards contained in the Executive Order are so vague that they violate the requirements of due process. It rests its contention upon the opinion in *Allen* v. *Grand Cent. Aircraft Co.*[10]

In view of the opinions in the Supreme Court in *Joint Anti-Fascist Committee* v. *McGrath*,[11] we think it is not now open for this court to hold that the procedure now provided by the Attorney General, including hearing and a finding upon an open record, need not be pursued. The several opinions of the Justices must be examined, no opinion for the Court having been announced. Mr. Justice Frankfurter and Mr. Justice Jackson stated their views that the listings of the petitioners were invalid for lack of procedural due process. Clearly, therefore, so far as those two Justices were concerned, had such process been proffered in an administrative procedure, the rule that administrative remedies must be exhausted would have applied. And implicit in their opinions is the prem-

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[7] Marcello v. Bonds, 23 U.S.L. WEEK 4267 (U.S. May 31, 1955).

[8] Shaughnessy v. Accardi, 349 U.S. 280 (1955).

[9] Trade Comm'n v. Cement Institute, 333 U.S. 683, 701, 92 L. Ed. 1010, 68 S. Ct. 793 (1948).

[10] 347 U.S. 535, 98 L. Ed. 933, 74 S. Ct. 745 (1954).

[11] 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (1951).

ise that the listings were not invalid for total lack of power in the President and the Attorney General. The three dissenting Justices, for whom Mr. Justice Reed wrote, were of opinion that the listings were valid upon the facts alleged in the complaint. So it is clear that they thought the listings were not invalid for total lack of power. Moreover these Justices reached their conclusion that due process had not been violated from the premise that no protected right was invaded by the listings. However, if we substitute for that premise the proposition established by the majority of the Court (*i.e.*, that a right had been invaded), it would seem clear that these three Justices would have concluded that procedural due process was necessary. Such a conclusion, as we have just said, carries with it the rule that administrative remedies must be exhausted. Mr. Justice Burton, writing for himself and Mr. Justice Douglas, was of opinion that the Attorney General's designation of the petitioners was arbitrary in the absence of supporting factual data. He footnoted the lack of hearing. If the administrative procedure there involved had provided a forum for the spreading of the facts upon an open record and a determination of the issues upon that record, it seems to us these Justices would necessarily have held that a court could not step in until that procedure had been pursued. If a revelation of the facts and a decision thereon had been provided, they would not have held that organizations proposed for listing could stop the action by avoiding the established procedure.

When the *Joint Anti-Fascist* case was before this court we had held flatly that the Executive Order was valid [12] and that it authorized the listing. If the Supreme Court had been of opinion that the Attorney General has no power whatever to designate organizations under the Executive Order, it seems to us the issue of a factual basis

[12] Joint Anti-Fascist Refugee Committee v. Clark, 85 U.S. App. D.C. 255, 260, 177 F. 2d 79, 84 (1949).

for a listing would have been immaterial and that the Court would necessarily have said so. Instead it remanded for such a factual determination.

The regulations [13] involved in the case now at bar provide for notice, hearings, and a determination upon the record,[14] except for classified security information. Since the Supreme Court had this problem before it and notably did not hold the Executive Order and any procedure under it invalid, we think the effect of its decision upon the problem now before us is that a prescribed procedure which provides hearing, etc., must be pursued, a rule which, as we shall see in a moment, applies even in the face of alleged invalidity.

That a claim of constitutional invalidity does not negative the requirement for exhaustion of remedies is made amply clear by the summary reversal by the Supreme Court in *Franklin* v. *Jonco Aircraft Corp.*[15] for the stated reason that the appellee had failed to exhaust its administrative remedy. The appellee had claimed the authorizing act to be unconstitutional.[16] *Allen* v. *Grand Cent. Aircraft Co., supra,* is to the same effect.[17]

The Guild says the rules of procedure are fatally defective in a number of concrete respects. But the rules do provide the features of hearing, etc., we have described, and so we think they meet the basic tests which are sufficient premise for a requirement that the remedy be exhausted. Some features of the rules do give pause. Such, for example, are the provisions eliminating, in the dis-

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[13] *Supra* note 6.

[14] 28 C.F.R. § 41.10 (1954).

[15] 346 U.S. 868, 98 L. Ed. 378, 74 S. Ct. 126 (1953).

[16] Jonco Aircraft Corp v. Franklin, 114 F. Supp. 392, 394 (N.D. Tex. 1953).

[17] See also National Enforcement Commission v. Olson, ... U.S. App. D.C. ....., ... F. 2d ..... (D.C. Cir. 1955).

cretion of the hearing officer, oral testimony, with its concomitant cross-examination, and accepting affidavits in lieu thereof; the provision that the hearing officer may dispense with the taking of evidence; and the provision that an "evasive" reply to an interrogatory "shall" be deemed an admission of the facts to which the interrogatory "refers". But we think answers to the problems posed by such provisions must await a case in which they have been applied. We cannot guess in advance the details of a proceeding to be held, when the rules of procedure permit a valid proceeding.

The Guild argues that the Attorney General's rules of procedure would permit a proceeding which would vary in several important respects from provisions of the Administrative Procedure Act.[18] Without deciding whether that Act does or does not apply, we point out that the rules of procedure also permit a proceeding which would comply in all respects with that Act. On this point, as on the prior one, it is enough for us to say we cannot now speculate as to the nature of the proceeding which may occur, or now hold invalid any and all proceedings on account of the possibilities. The Guild cites *Wong Yang Sung* v. *McGrath*,[19] but that case does not negate the position we have just indicated. Moreover we think the Supreme Court did not there mean that an Administrative Procedure Act hearing is the only means of satisfying the requirements of due process.[20]

The Guild says the proffered administrative remedy need not be exhausted, because no statute authorized the proceeding. Without elaborating the point we merely say that the opinion of the Supreme Court in *Allen* v. *Grand Cent. Aircraft Co., supra*, conclusively establishes that

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[18] 60 STAT. 237 (1946), as amended, 5 U.S.C.A. § 1001 *et seq.*

[19] 339 U.S. 33, 94 L. Ed. 616, 70 S. Ct. 445 (1950).

[20] See Marcello v. Bonds, *supra*, and the same case in the Court of Appeals, Marcello v. Ahrens, 212 F. 2d 830 (5th Cir. 1954).

administrative remedies validly established by regulation must be exhausted.

The Guild says it will be irreparably damaged both by the proceeding upon the proposed designation, regardless of the final result after the hearing, and by a final designation. But much of the damage had already been suffered by the Guild before the complaint was filed, and any action by the District Court on the complaint would have been too late to prevent it. Moreover we doubt that the Guild suffered or will suffer proportionately greater damage than any organization placed on that list would suffer, and the opinions in *Joint Anti-Fascist, supra,* preclude our holding that such damage offsets the normal requirement that the administrative remedy must be exhausted. The Court there described the damage threatened but notably did not say this precluded the necessity for undergoing a hearing afforded.

The Guild also attacks the interrogatories submitted to it. Some further revision of these questions is probably in order. For example, some of the amended questions appear to be extremely difficult, if not impossible, of answer. The Guild says it had at times some thirty chapters and several thousand members, many of whom no longer belong to it. A few of the interrogatories are: No. 60, "To your knowledge[21] has * * * any * * * chapter of the NLG ever permitted the use of its mailing list to any other organization?" No. 64, "Has the NLG or any of the * * * chapters thereof, passed an anti-Communist or anti-Soviet Union resolution since 1946?" No. 49, " * * * have you reason to believe that any of the * * * past members of any * * * chapter of the NLG * * * ever has been [a] * * * member of the CP [Communist Party] * * * ?" "If so, identify each of them * * *." No. 50, " * * * have you reason to believe that * * * any * * * chapter * * *

[21] These questions are addressed to an unincorporated association.

ever furnished information to the 'Daily Worker' • • • on any occasion when such information was not likewise furnished to other newspapers or news services?" The foregoing are by way of example only. We do not intend a critical analysis. We think the proper place to test these interrogatories in the first instance is before the administrative body. We cannot anticipate the administrative action, if such a step were taken, any more than we can anticipate the outcome of the proceeding itself. Some modifications have already been made, and we cannot now say that others will not be made if specific application is made.

We are of opinion that the Guild must exhaust the proffered administrative remedy. For that reason the judgment of the District Court is

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 12,495

APRIL TERM, 1955.

NATIONAL LAWYERS GUILD,
Appellant,

v.

HERBERT BROWNELL, JR.,
Attorney General of the United States,
Appellee.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED JULY 14, 1955

JOSEPH W. STEWART, Clerk

Appeal from the United States District Court for the District of Columbia—

Before:

PRETTYMAN, WILBUR K. MILLER and DANAHER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: July 14, 1955.

Per Circuit JUDGE PRETTYMAN.

APPENDIX B

Executive Orders and Regulations Involved

1. Pertinent provisions of Executive Order 10450 of April 29, 1953 (18 F.R. 2489) are as follows:

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631);[4] the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, et seq.)[5] section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j);[6] and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22-1, et seq.)[7]

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[4] 5 U. S. C. A. § 631.

[5] 5 U. S. C. A. § 632 et seq.

[6] 5 U. S. C. A. § 118j.

[7] 5 U. S. C. A. § 22-1 et seq.

and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

Sec. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

Sec. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

Sec. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950 .

Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addition, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the

interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

Sec. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the

information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency. (Section 11 not pertinent.)

Sec. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

Sec. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER

THE WHITE HOUSE
April 27, 1953

* * * * * * *

2. Paragraph 3 of Part III of Executive Order 9835 (12 F.R. 1935) is as follows:

"3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designate as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

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3. Department of Justice Regulation of April 29, 1953 (18 F.R. 2619) follows:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

PART 41—DESIGNATION OF ORGANIZATIONS IN CONNECTION WITH THE FEDERAL EMPLOYEE SECURITY PROGRAM

By virtue of the authority vested in the Attorney General by section 22 of title 5 of the United States Code, and by Executive Order No. 9835 of March 21, 1947, and Executive Order No. 10450 of April 27, 1953, I hereby prescribe the following rules of procedure with respect to notice, hearing, and designation of organizations in connection with the Federal employee security program.

Sec.

41.1 Notice to and by organizations

41.2 Statement and interrogatories by Attorney General

41.3 Reply by organization

41.4 Request for hearing

41.5 Notice of hearing

41.6 Default

41.7 Hearing board or officer

41.8 Hearing

41.9 Recording of testimony

41.10 Determination

41.11 Previous designations not affected

Section 41.1 NOTICE TO AND BY ORGANIZATIONS

(a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization pursuant to Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by registered mail to such organization at its last known address. If the registered notice is delivered, the organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450, whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the Federal Register, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the Federal Register, such organization may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the Federal Register.

(c) The notice of contest provided in this Part shall be signed by the executive officers (or persons performing the

ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

Section 41.2 Statement and interrogatories by Attorney General

Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

Section 41.3 Reply by Organization

The organization, within sixty days following receipt of such statement and interrogatories, may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

Section 41.4 Request for hearing

Any organization filing a reply as provided in this Part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

Section 41.5 Notice of hearing

Upon receipt of a request as provided in Section 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

Section 41.6 Default

When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

Section 41.7 Hearing Board or Officer

For the purpose of conducting any hearing as provided in this Part the Attorney General shall assign such officer or board as he shall deem necessary.

Section 41.8 Hearing

(a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this Part it appears to the board or hearing officer that a determination may appropriately be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence

in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may be received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination, provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

Section 41.9 Recording of testimony

The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

Section 41.10 Determination

Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, replies to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosure to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

Section 41.11 Previous designations not affected

The promulgation of the rules of procedure contained in this Part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

APPENDIX C

The Attorney General's list of subversive organizations, promulgated pursuant to Executive Order 10450, was designed to serve as a guide to Federal Government Department heads and Loyalty Review Boards in determining the loyalty of government employees. Membership in a listed organization was to be considered as *some* evidence of disloyalty.

This appendix is intended to afford illustrations of the extensive use of the list for purposes beyond its defined scope. It does not purport to cover all the types of instances in which the list has been used, nor does it make any effort to appraise the *indirect* effect of the listing process on the public at large, through the resultant inhibition against joining any organizations at all. For an illuminating psychological survey directed toward this point, see Jahoda and Cook, *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of the Loyalty and Security Programs,* 61 Yale L. J. 295-333.)

In the instances noted below, membership in a listed organization is used as one criterion among many to determine the individual's fitness for work, housing, etc. or, when marked with an asterisk (*), it is a disqualifying factor *per se.*

I. National and Federal Government Level

*1. tenancy—prospective or continuing—in federally-aided housing projects. (Independent Offices Appropriation Act, 66 Stat. 393, 403; 42 U.S.C. 1411(c).)

This law has been implemented by local housing authorities which require oaths of non-membership. (E.g., N. Y. City Housing Authority Resolution No. 52-12-734, Dec. 11, 1952.)

2. employment in merchant marine (33 C.F.R. 121, 122.13(d)(5)(i)). The Coast Guard program affects more than half a million people. Weinstein and Brown, *Preliminary Study (Revised)—Personnel Security Programs of the Federal Government* (1954). The Fund for the Republic.

3. employment in plants which have contracts with

   (a) the Defense Department. (Department of Defense Regulations, issued May 4, 1953.) From 1950 to 1954 about 20,000 plants and 500,000 employees have been cleared for secret information and about two million employees for confidential material. It is estimated that 200 facilities and 4,000 employees are cleared monthly. (*Preliminary Study*, supra).

   (b) the Atomic Energy Commission. (68 Stat. 919 (1954); 10 C.F.R. Part 4).

4. retention in Armed Forces and honorable discharge therefrom. (E.g., Army Regulations 604-10).

5. passport. (See *Schachtman* v. *Dulles* 6/23/55 (CA D.C.) (Subsequent to the decision, a passport was issued.)

6. employment by public international organizations of which the United States is a member. (Executive Order 10422, making the procedures and standards of Executive Order 9835 applicable to these present or prospective employees.)

II. State and Municipal Level

1. state and county employment in:

*Arizona. (Ariz. Code Ann. Sec. 70-138.)

*Connecticut. (Rule 17, Rules and Regulations and Related Statutes for State Classified Service.)

*Louisiana. (Rev. Stat. Ann. Sec. 14:362, 14:359.)

New York. 65 McKinney's Unconsolidated Laws Sec. 1101-1108 (1954 cum. supp.).

*Texas. (Ann. Stat. tit. 110A sec. 6252-7 (1953 Supp.).)

Hawaii. (Territory of Hawaii, Laws of 1951, Series A-20 Sec. 580-20(F).)

2. municipal employment in:

Newark, N. J. (N. Y. Times May 25, 1955 p. 13, col 1.)

Detroit, Mich. (Detroit Charter Amend. no. 25, April 2, 1951.)

New York, N. Y. Department of Welfare (New York Times Nov. 22, 1950).

3. teaching positions in all grades of State educational systems under all statutes listed in II A *supra* as well as in:

New York. (Feinberg Law, N. Y. Laws 1949 c. 360.)

*Washington. (1955 statute, Seattle Post-Intelligencer, Aug. 30, 1955 p. 1, col. 3.) In regard to university professors see *Savelle and Nostrand* v. *U. of Washington*, Thurston County Superior Court, order of Aug. 29, 1955.

*South Carolina. (Laws 1950, c. 1053, sec. 68 par. 2.)

4. insurance brokers in New York. (New York Times Oct. 20, 1955 p. 1 col. 4; rule temporarily suspended, New York Times Oct. 23, 1955, sec. 1 p. 1 col. 8.)

5. Textbooks barred from public schools or libraries where authored by living members of listed organizations in:

   *Texas. (Vernon's Anno. Stat. Tit. 110-A sec. 7.)

   *Alabama. (Code of Ala. T. 52 sec. 433(6)(a).)

   Shaftsbury, Vt. (New York Times Nov. 14, 1953.)

6. *Members of or contributors to listed organizations must register with the Chief of Police in Erie Pa., under criminal penalties.

III. Private Employment

The scope of the use of the list to screen employees of private employers which have contracts with the Department of Defense and the Atomic Energy Commission is indicated above in I A 3. Similar programs have been followed by private employers who are under no government obligation to do so and whose employees have no connection whatever with Government security matters. No comprehensive study has yet been made of the extent of this now rather fashionable procedure, but instances are afforded in all areas of work. Only a handful of examples are given here where employees, present or prospective, have been asked to disavow membership in listed organizations in order to secure or retain employment:

Columbia Broadcasting System. (New York Times Dec. 21, 1950 p. 1 col. 6.)

Consolidated Edison Co. (Coll. bargaining agreement with Utility Workers C.I.O., 23 Lab. Rel. (Ref. Man.) 8 (1949).)

To this may be added numerous instances of loss of jobs in the entertainment industry. See, e.g., New York Times Sept. 3, 1950, Oct. 22, 1950.

IV. Admission to the Bar

Questions concerning applicant's membership in listed organizations are asked in the following states:

*Colorado. (Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. Chi. L. R. 480, 484-5 (1953).)

Indiana. (id. at 491.)

Hawaii. (ibid.)

In the remaining instances the organization itself is denied rights:

1. tuition fees from educational benefits disbursed to veterans (66 Stat. 667 (1952), 38 U.S.C. [illegible]sec. 933).
2. tax exemption (see Treasury Dept. Press Service No. S-613, Feb. 4, 1948, Prentiss Hall Tax Service par. 12760-A. Note: the exempt status of 16 organizations was revoked on first publication of list which contained their names (Bontecou, The Federal Loyalty-Security Program, Cornell Univ. Press 1953).
3. summer camps owned by or employing members of listed organizations may not be listed in Directory of New York State Department of Commerce (New York Times Aug. 27, 1954).
4. Madison Square Garden and Manhattan Center, New York meeting places, announced in 1950 a policy of refusing to rent to organizations on the Attorney General's list (New York Times Aug. 29, 1950, p. 20, col. 5; October 20, 1950, p. 16, col. 1). There has been no public revocation of such policy.

5. solicitation of funds (statement of counsel of N. Y. C. Dept. of Welfare, reported in New York Times Jan. 25, 1949 p. 46 col. 7).

APPENDIX D

Extract from Attorney General's Speech to American Bar Association

The purpose of designating an organization as subversive is solely to alert the security agencies that the group involved is permeated with Communists and fellow travellers so that where it appears that a government employee is a member this factor may be taken into account in determining whether he is a security risk.

The designation of an organization is now preceded by the most thorough investigation and study of all the evidence. Where the evidence indicates that an organization is not what it outwardly claims to be, but is in fact and sympathy aligned with the Communist movement, then it is my responsibility as Attorney General to make that fact public. Uninformed loyal citizens must have the opportunity of disassociating from such groups at the earliest possible time, for continued activity in such groups may render them ineligible for Government employment. And this applies to every type of organization. Lawyer groups have not been exempt from infiltration by the Communists, and where this has occurred, I will make no exception for them.

We have been studying evidence that the National Lawyers Guild be included in the list of subversive organizations. Because this organization originally attracted

some very well-known and completely loyal Amer-
90 ican citizens including many Colored members who found it would admit them (at a time when our American Bar Association failed to do so), I have conducted the study with great care. I am now prepared to make this determination public.

It has been clear that at least since 1946 the leadership of the Guild has been in the hands of card-carrying Communists and prominent fellow travellers. On every major issue since then it has steadfastly followed the Party line and its programs and actions have been consistent with it, excepting only those issues so notorious that their espousal would too clearly demonstrate the Communist control. It has become more and more the legal mouthpiece for the Communist Party and its members, and it has consistently opposed all laws or investigations which have sought to curb or expose Communist activity in the United States. It is because the evidence shows that the National Lawyers Guild is at present a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations.

* * * * * * * * * *

Extract from Attorney General's Speech to Amvets

In this security program, the Attorney General is required to maintain a list of organizations designated as subversive. The purpose is solely to alert the various government agencies that a designated organization is permeated with Communists and fellow-travelers. Where it appears that a government employee is a member of such an organization, this factor may be taken into account in determining whether he is a security risk.

Thorough investigation and study of evidence precedes the designation of an organization. When the evidence indicates that an organization is in fact and sympathy aligned with the Communist movement, then it is my responsibility as Attorney General to move to designate it as subversive and to make that fact public

Publication of the fact makes it possible for uninformed loyal citizens to disassociate themselves from such groups at the earliest possible moment. Continued activity in such groups could render them ineligible for Government employment.

The most recent group upon whom notice of proposed designation was served is the National Lawyers Guild.

The evidence is clear that at least since 1946, the leadership of the National Lawyers Guild has been in the hands of card-carrying Communists and prominent fellow-travelers. It has become more and more the legal mouthpiece of the Communist Party and its members. It has consistently opposed all laws or investigations by
98 which the freedom-loving people of this country have sought to curb or expose Communist activity in the United States.

We charge that the Guild is dominated and controlled by the Communists and fully committed to the Communist Party line. Shortly it will be specifically charged that:

(1) The Guild and its affiliated chapters were initiated, proposed and organized under the direct supervision of the Communist Party of the United States.

(2) The Guild and its affiliated chapters are being and have been utilized by the Communist Party and its members to indoctrinate members of the legal profession for the purpose of securing support for and sympathy with the policies, objectives and program of the Communist Party, and thereby to serve as the legal arm of the Communist Party.

(3) From 1946 until the present, the Guild and its affiliated chapters have closely followed, supported, and paralleled the policies and programs of the Communist Party.

(4) From 1946 until the present, the National Lawyers Guild and its affiliated chapters have substantially followed, supported, and paralleled the foreign policy of the Soviet Union and opposed the policy of the United States when in conflict with that of Soviet Russia.

99 (5) From 1946 until the present, the executive officers or persons performing the duties of executive officers, have included past or present members of the Communist Party and individuals with a substantial record of Communist front membership and activity. Such individuals have directed, supervised and dominated the policies, programs and activities of the National Lawyers Guild.

As an organization, the National Lawyers Guild has interceded in practically every major case involving the Communist Party, its officials and its front organizations. In every instance, these intercessions were on behalf of the Communists. It interceded for Gerhardt Eisler, Communist international agent convicted of passport fraud and contempt of Congress. Eisler, like Thompson, was one of those who fled after conviction. You all recall his spectacular appearance as a stowaway aboard the Polish motorship BATORY.

To name a few more cases in which the Guild, as an organization, interceded, there was that of Carl Aldo Marzani, who was convicted of concealing Communist affiliations while employed by the Federal Government; John Howard Lawson and Dawson Trumbo, Hollywood screenwriters convicted of contempt of Congress; disbarment proceedings against the contemptuous lawyers who represented Party leaders in Smith Act cases, and the case of the atomic spies, Julius and Ethel Rosenberg.

One of its members appeared as defense lawyer for Valentin Gubitchev, the Russian charged with spying against the United States in the Judy Coplon case. This member based many of his questions on notes passed to him by a representative of the Soviet Embassy, who was sitting at his side during the trial. This Russian official was the Second Secretary of the Embassy, Yuri Novikov, who in January of this year was declared persona non grata by the State Department for engaging in Soviet espionage with Otto Verber and Kurt Ponger. Both Verber and Ponger subsequently pleaded guilty to espionage.

I would like also to give some examples of how the Guild has followed the Communist Party line. In 1950, the "Daily Worker" attacked the New York City Board of Education trial of a school teacher accused of being a Communist. The "Lawyers Guild Review" reports a resolution by the Guild deploring continued attacks upon intellectual freedom of students and teachers.

Over the years, the Communist Party has attacked Mr. Hoover as "chief of the national thought police," and has called for a halt to the FBI's efforts to fight Communism. In resolutions the Guild has opposed what it called the Gestapo activities of the FBI and demanded removal of Mr. Hoover.

Following the Communist line, they attacked contempt citations upon the contemptuous Communist leaders' attorneys; various committees of Congress investigating Communism; the European Recovery Plan; the Smith Act prosecutions; the non-Communist affidavit of the Labor-Management Relations Act, among others.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 496

NATIONAL LAWYERS GUILD, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (II–R. 113–117) [1] is reported at 126 F. Supp. 730.

[1] The certified record is in two parts. The first part, designated as "I–R.," is the printed joint appendix on petitioner's earlier appeal from the denial of its motion for a preliminary injunction (No. 12,059 below) (I–R. 1–72). This printed joint appendix was incorporated by reference into the joint appendix filed on petitioner's second appeal. The second part, designated as "II–R.," is made up of (a) the printed joint appendix on the second appeal (No. 12,495) (II–R. 1–122), and (b) the record of proceedings in the court below on the second appeal (II–R. 123–141).

The opinion of the United States Court of Appeals for the District of Columbia Circuit (II–R. 123–133) is reported at 225 F. 2d 552. The opinion of the United States Court of Appeals for the District of Columbia Circuit on petitioner's earlier appeal from the denial of its motion for a preliminary injunction is reported at 215 F. 2d 485.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955 (Pet. App. 32; II–R. 134). A petition for rehearing *in banc* (II–R. 135–138), filed on July 29, 1955, was denied on October 4, 1955 (II–R. 139). The petition for a writ of certiorari was filed on October 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether both courts below erred in ruling that petitioner must exhaust its administrative remedy.

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

Pertinent provisions of Executive Order 10450 of April 27, 1953, 18 F. R. 2489, and of Executive Order 9835 of March 21, 1947, 12 F. R. 1935, are set forth in the Appendix, *infra,* pp. 22–26. The Rules of Procedure prescribed by the Attorney General on April 29, 1953, 18 F. R. 2619, with respect to notice, hearing, and designation of organizations under these Orders are set forth in the Appendix, *infra,* pp. 28–33.

STATEMENT

In this action, petitioner, the National Lawyers Guild, seeks to enjoin administrative proceedings initiated by respondent, the Attorney General, under Executive Order 10450—the President's Federal Employee Security Program—to determine whether petitioner is an organization which comes within the purview of that Order. The complaint attacks the Executive Order as a Bill of Attainder and as invalid under the First, Fifth, Ninth and Tenth Amendments. In addition, the complaint asserts that the Rules of Procedure adopted by the Attorney General with respect to notice, hearing and designation of organizations violate due process of law. Petitioner also alleges that the Attorney General is disqualified from continuing the pending administrative hearing because of his alleged prejudgment of the issues. (I–R. 8–12.)

The pertinent facts may be summarized as follows:

1. *The Orders and Rules of Procedure.*—Executive Order 10450, 18 F. R. 2489 (App. *infra*, pp. 22–26), was issued on April 27, 1953, pursuant to authority vested in the President "by the Constitution and statutes of the United States, including sections 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the

act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, *et seq.*)". It revoked and superseded Executive Order 9835, 12 F. R. 1935 (App. *infra*, p. 27), which had established the President's Federal Employees Loyalty Program (see *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123).

Executive Order 10450 established new standards and procedures, based on considerations of security rather than loyalty, governing the employment and retention in employment of persons in the federal service. In conformity with the Act of August 26, 1950 (cited in the preamble of the Order), which permits the summary suspension of federal employees in the interests of national security, Executive Order 10450 prescribes the standard that employment and retention in employment of all government officers and employees be "clearly consistent with the interests of the national security" (Secs. 2, 5, 6, 8; App. *infra*, pp. 23–24).

Like the earlier Loyalty Program, however, one of the factors to be considered in reaching determinations under the Security Program is "[m]embership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, * * * " (Sec. 8 (a) (5) App. *infra*, p. 25). Towards this end, the Department of Justice is directed to continue to

furnish the information described in Part III, Paragraph 3, of Executive Order 9835[2] (App. *infra*, p. 27) directly to the heads of executive departments and agencies (Secs. 12, 13, App. *infra*, pp. 26). Pursuant to this directive, the Attorney General, on April 29, 1953, 18 F. R. 2741, redesignated the organizations previously designated under Executive Order 9835. Concurrently, the Attorney General prescribed Rules of Procedure with respect to notice, hearing, and designation of organizations, 18 F. R. 2619 (App. *infra*, pp. 27–33).

The Rules extend to an organization, which the Attorney General, after appropriate investigation, proposes to designate, the privilege of filing with the Attorney General, within ten days following receipt of notice by registered mail of the proposed action, a statement that it contests the proposed designation. Sec. 41.1 (b) (App. *infra*, pp. 28–29). To insure that notice of the proposed action is received, the Rules provide that if the original notice is not delivered, the Attorney General shall cause the notice to be published

[2] "* * * the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

in the Federal Register, supplemented by such additional notice as he may deem appropriate (*ibid.*). Failure to contest the proposed action may result, after an appropriate determination, in the designation of the organization (*ibid.*).

The Rules prescribe that, within sixty days after a proposed designation is contested, the Attorney General shall furnish the organization in question with a statement of the grounds upon which the contemplated action is based and written interrogatories with respect thereto. Sec. 41.2 (App. *infra*, pp. 29–30). The organization is then given sixty days after receipt thereof within which to reply. Sec. 41.3 (App. *infra*, p. 30). With its reply, the organization may submit supporting affidavits and a request for an administrative hearing. Sec. 41.3, 41.4 (App. *infra*, p. 30). Upon receipt of such a request, the Attorney General is required to set a date and fix a place for the hearing, and to notify the organization thereof by registered mail. Sec. 41.5 (App. *infra*, p. 31).

The hearing required by the Rules is to be conducted informally, and in an orderly and impartial manner, before a board or officer selected by the Attorney General. Sec. 41.7, 41.8 (c) (App. *infra*, p. 31). During the proceedings an organization is entitled: —to be represented by counsel of its own choice (Sec. 41.8 (d), App. *infra*, p. 31); to introduce relevant or material

evidence (Sec. 41.8 (f), App. *infra,* p. 32); to file objections to, and be heard on, the admission or exclusion of evidence (Sec. 41.8 (h), App. *infra,* p. 32); to cross-examine witnesses insofar as consistent with interests of national security (Sec. 41.8 (j), App. *infra,* p. 32); and to inspect or be furnished with, on payment of costs, a transcript of the proceedings (Sec. 41.9, App. *infra,* p. 33). Relevant or material evidence, in summary form where full disclosure would be inimicable to the security of the nation, may also be introduced on behalf of the Attorney General (Sec. 41.8 (b) and (i), App. *infra,* pp. 31, 32).

Within a reasonable time following completion of the hearing, the Attorney General is required to make his final determination on the basis of the entire record, and to notify the organization in question by registered mail. Sec. 41.10 (App. *infra,* p. 33). Any handicap imposed upon an organization by virtue of the non-disclosure of classified security information or the identity of confidential informants is to be taken into consideration by the Attorney General in making his final determination (*ibid.*).

2. *Administrative actions prior to suit.*—On August 27, 1953, the Attorney General, by registered letter, served notice upon petitioner that he proposed to designate it "as coming within the purview of Executive Order No. 10450 in accordance with the rules promulgated thereunder".

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A copy of the Rules was attached to the notice. (I–R. 68).

On August 27, 1953, and subsequently on September 5, 1953, the Attorney General announced in speeches delivered to the American Bar Association and to the American Veterans of World War II that he had served notice upon petitioner that he proposed to designate it as coming within the purview of the Order. In these speeches, the Attorney General also made public the nature of certain of the charges upon which the proposal to designate was based (II–R. 8–20 and 21–31).

On September 16, 1953, petitioner filed a notice of contest, having obtained an extension of time to September 17, 1953 (I–R. 15–20). On or about November 17, 1953, in accordance with Section 41.2 of the Rules of Procedure (App. *infra*, pp. 29–30), petitioner was served with a statement of the grounds upon which the proposal to designate was based (I–R. 23–25). Accompanying the statement of grounds, in accordance with Section 41.2 of the Rules, were sixty-six interrogatories with respect thereto (I–R. 44–64).

In pertinent part, the statement of grounds asserted that petitioner was "proposed and initiated under the direction and supervision of the Communist Party", and that petitioner "has been utilized by the Communist Party and Communist Party members to indoctrinate members of the legal profession for the purpose of securing support for and sympathy with the policies, objec-

tives, and programs of the Communist Party and to serve as a legal arm of the Communist Party" (I–R. 24). It was further charged that, from 1946 to date, petitioner has substantially followed, supported and paralleled the policies and programs of the Communist Party and the foreign policy of the Soviet Union; opposed the policy of the United States when in conflict with that of the Soviet Union; and has been dominated in its activities by acknowledged leaders, officials and members of the Communist Party and persons with a substantial record of membership in, or activities on behalf of, organizations designated in the past by the Attorney General (I–R. 24).

3. *Proceedings relating to petitioner's motion for a preliminary injunction (No. 12,059 below).*— Petitioner began this litigation in the District Court for the District of Columbia on November 30, 1953 (I–R. 1). On December 4, 1953, petitioner moved for a preliminary injunction (I–R. 25–26). In support of its motion, petitioner submitted affidavits stating that the Attorney General's proposed designation of petitioner would cause petitioner irreparable injury for which it had no adequate remedy at law, including damages to its reputation and prestige, interference with public acceptance of its publications, programs and recommendations, loss of present and prospective members, and loss of membership dues and public donations (I–R. 12, 26–29, 64–67). In addition, petitioner claimed that its members would be sub-

jected to various governmental sanctions should it be designated by the Attorney General (I–R. 6). It was further claimed that answering the interrogatories "would be extremely onerous, and burdensome, and as to some of the questions, impossible or virtually so," and that this "would entail a huge expense and effort in research, investigation, analysis, and compilation" (I–R. 27). But see *infra,* p. 13.

On December 30, 1953, before the filing of any responsive pleading to petitioner's complaint, Judge Keech denied petitioner's motion for a preliminary injunction (I–R. 71–72). He found that petitioner "has failed to demonstrate that it is suffering such irreparable harm as to justify judicial interference at this time" and that "[t]he injury that a preliminary injunction would do to the Government outweighs any injury [petitioner] would allegedly incur" (I–R. 71).

Concurrently, petitioner was also pursuing its administrative remedy. Earlier, on December 23, 1953, it had requested an extension of time to April 1, 1954, within which to answer the statement of grounds and the interrogatories (II–R. 31). In response to this request, the Attorney General, on December 30, 1953, granted petitioner an extension of time to March 1, 1954, within which to answer the interrogatories and an extension of time to February 1, 1954, within which to request modification of the interrogatories (II–R. 32–33). On March 19, 1954 (II–R. 34),

pursuant to petitioner's timely application (II–R. 35–42), the Attorney General served petitioner with sixty-four amended interrogatories (II–R. 44–65) in place of the sixty-six originally served. Petitioner's answer thereto was due thirty days thereafter (II–R. 43). On April 15, 1954, in answer to petitioner's request that its time be extended to thirty days after action by the Court of Appeals on its motion for a stay (II–R. 66), the Attorney General granted petitioner an extension to May 5, 1954, within which to reply to the amended interrogatories (II–R. 67–68).

On May 4, 1954, the Court of Appeals (Circuit Judges Prettyman and Miller, and District Judge McGuire) entered an order reversing and remanding the cause. The Court of Appeals stated "that the interests of justice would be served best in this matter if the administrative hearing were held in abeyance pending the judgment of the District Court upon the merits of the issues posed in the action." *National Lawyers Guild* v. *Brownell,* 215 F. 2d 485. However, in granting this limited stay, the Court of Appeals expressly declined to grant petitioner's "motion * * * for a preliminary injunction of the usual scope, effective until the ultimate disposition of the case, including appeals * * * [because] we think such an extensive stay is not justified at the present stage of the proceedings." (*ibid.*).

4. *Proceedings relating to respondent's motion for judgment* (*No. 12,495 below*).—On remand,

after filing a supplemental answer (II–R. 34–35),[3] respondent moved for judgment on the pleadings or, in the alternative, for summary judgment (II–R. 69). In support of the motion for summary judgment, respondent, as Attorney General of the United States, filed an affidavit denying petitioner's charge of prejudgment (II–R. 109–112). Respondent stated in the affidavit that the only determination made by him thus far is the preliminary determination that the evidence warrants the proposal to designate petitioner, *i. e.,* an initial *ex parte* determination that a *prima facie* case exists (II–R. 111–112). In addition, respondent reaffirmed his intention to make an impartial final determination at the completion of the pending administrative proceedings (II–R. 112).

On November 4, 1954, Judge McLaughlin filed a memorandum opinion, granting respondent's motion for summary judgment (II–R. 113–117). Judge McLaughlin held that the mandate of the Court of Appeals had left for the District Court's consideration the question of the applicability of the doctrine of exhaustion of administrative remedies (II–R. 121). He found that the pleadings, exhibits and affidavits on file show that there

[3] Respondent had filed his answer to the complaint on January 29, 1954 (II–R. 2–8), after petitioner had taken an appeal to the Court of Appeals from the District Court's order of December 30, 1953, denying a preliminary injunction.

is no genuine issue as to any material fact, and, in particular, that the claim of prejudgment relied upon by petitioner does not present such an issue (II–R. 121). Judge McLaughlin concluded that respondent's public statements would not prevent him from rendering an impartial decision on the question whether or not petitioner should be designated (II–R. 121), and that, since petitioner has failed to exhaust its administrative remedy, petitioner is not entitled to judicial relief of the character here sought (II–R. 122).

On November 23, 1954, Judge McLaughlin entered summary judgment for respondent (II–R. 122), and denied petitioner's motion for a stay pending appeal. With respondent's consent, the trial judge stayed the administrative proceedings to December 9, 1954, in order to permit petitioner to apply to the Court of Appeals for a stay pending appeal. On December 9, 1954, respondent advised the Court of Appeals that he would voluntarily hold the administrative proceedings in abeyance pending disposition of petitioner's motion for a stay, and that if the motion were denied, petitioner would be granted an additional three days in which to file its reply to the amended interrogatories. In this connection, petitioner orally advised the Court of Appeals that its reply to the amended interrogatories had already been prepared. See *supra*, p. 10.

On December 23, 1954, the Court of Appeals (Stephens, Danaher and Bastian, JJ.) denied petitioner's motion for a stay pending appeal. On December 27, 1954, petitioner applied to the Chief Justice of the United States for a stay pending appeal.[4] Again, respondent voluntarily agreed to hold the administrative proceedings in abeyance pending disposition of the application. No action was ever taken on the application by the Chief Justice.

On July 14, 1955, the Court of Appeals (Prettyman, Miller and Danaher, JJ.) affirmed the District Court's ruling that petitioner must exhaust its administrative remedy (Pet. App. 32; II–R. 134). That court held that the doctrine of exhaustion of administrative remedies was not negatived by a claim of constitutional invalidity; that, since the Attorney General's Rules of Procedure permit a proceeding which complies with due process, the court cannot speculate at this time as to the nature of the proceeding which may occur; that, with respect to alleged prejudgment, petitioner must await developments at the administrative hearings; and that petitioner's claim of irreparable injury is insufficient to excuse exhaustion (Pet. App. 21–31; II–R. 123–133). A petition for rehearing *in banc* (II–R. 135–138) was denied on October 4, 1955 (II–R. 139).

[4] With neither of these requests for stays did petitioner submit new affidavits which might have substantiated the predictions of irreparable injury made a year earlier when suit was brought.

Although petitioner had prepared its reply to the amended interrogatories by December 1954 (see *supra*, p. 13), petitioner had not filed that reply under the terms of respondent's agreement of December 1954 to postpone further administrative action until the Chief Justice acted upon petitioner's application for a stay pending appeal. Since that application is now moot, respondent has agreed that petitioner's reply may again be held in abeyance pending disposition of the petition for a writ of certiorari.

ARGUMENT

Petitioner asks this Court to hold that the Attorney General may not constitutionally designate an organization as communist under the federal employee security program. Petitioner asserts (a) that no such power may constitutionally exist, and (b) that, if it does, there are restrictions on the method of its exercise which have allegedly been violated (Pet. 13). As we read *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123,[5] in the light of, and

[5] The identical contentions were advanced by the organizations involved in the *Joint Anti-Fascist Refugee Committee* case. See Brief for Petitioner, No. 8, O. T. 1950, p. 48. Only one of the majority justices agreed that the listings were invalid for total lack of power in the President and the Attorney General (341 U. S. at 142, 143); three other members of the majority implicity rejected

together with, *Adler* v. *Board of Education*, 342 U. S. 485, this Court has already declared that the power does exist where listings are made after notice and hearing. Assuming, however, that this question is still open, it is prematurely raised here since petitioner has not been designated and has not exhausted its administrative remedy.

1. Petitioner contends that the exhaustion doctrine is inapplicable where the constitutional power to act is itself challenged (Pet. 13). This Court has held to the contrary in several cases. *E. g., Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752.

Petitioner attempts to distinguish such cases on the ground that no Act of Congress is here involved (Pet. 15–16).[6] However, judicial deference to a statutory scheme is not the sole reason for the exhaustion rule. It also rests upon the important consideration that the exhaustion of an administrative remedy may obviate the need for

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this basic contention by accepting the secondary contention that the designations were invalid for want of notice and hearing (341 U. S. at 149, 174, 183); the three dissenting justices flatly rejected the basic contention (341 U. S. at 187).

[6] As noted in the Statement, (*supra*, pp. 3–4), Executive Order 10450 expressly rests upon the authority vested in the President by several statutes. In saying that no statute is here involved, petitioner presumably means that no statute expressly directs the Attorney General to compile the list of organizations in issue.

any judicial determination or render precise the scope of decision necessary. Cf. *Aircraft & Diesel Corp.* v. *Hirsch, supra,* at 772–773. Thus, this Court has required exhaustion of administrative remedies despite the absence of a statutory scheme for administrative proceedings followed by judicial review. *E. g.*, where the statute provided for finality of the administrative determination (*Aircraft & Diesel Corp.* v. *Hirsch, supra*); where the administrative proceeding was prescribed by regulation rather than statute and no provision was made for judicial review (*Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868; *Fahey* v. *Mallonee*, 332 U. S. 245); where neither the statute nor the regulation prescribed an administrative hearing and no provision was made for judicial review (*Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117); and where, although the statute did provide for judicial review, neither the statute nor the agency had provided for administrative hearings (*Bourjois, Inc.* v. *Chapman*, 301 U. S. 183).

2. Petitioner argues that this action is not untimely because the administrative procedures are "grossly inadequate" and "a caricature of due process" (Pet. 14). Conceivably, the Attorney General's Rules of Procedure would permit a proceeding which would vary in several respects from provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.* But

even assuming that that Act applied and that its safeguards fix the minimum requirements of due process,' it is equally true, as the court below specifically pointed out (Pet. App. 29), that the Rules "also permit a proceeding which would comply in all respects with that Act". In the circumstances, the court below was clearly justified in refusing to speculate as to the nature of the proceeding which may occur.[8] As this Court has wisely cautioned, "[w]e cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee*, 332 U. S. 245, 256; cf. *Yakus* v. *United*

[7] But cf. *Marcello* v. *Bonds*, 349 U. S. 302.

[8] Cf. also *Parker* v. *Lester*, decided October 26, 1955, by the Court of Appeals for the Ninth Circuit, in which the court stated (slip opinion p. 10, fn. 11a):

"This distinction [between regulations thought to be incapable of affording a fair hearing and those which do permit such a hearing] is pointed up by a comparison of the regulations adopted in conformity with the decree below, and the regulations considered in National Lawyers Guild v. Brownell, (D. C. cir), —— F. 2d —— (decided July 14, 1955). In that case the court pointed out that the Attorney General's rules of procedure there considered 'permit a proceeding which would comply in all respects with that [Administrative Procedure] Act. On this point, as on the prior one, it is enough for us to say we cannot now speculate as to the nature of the proceeding which may occur. . . .' Here, on the contrary, the Coast Guard regulations expressly recite (note 5, supra): 'This statement shall not be worded with such particularity as to disclose the sources of such information or data, nor the identity of any person or persons who may have furnished such information or data, to said person or other persons.'"

States, 321 U. S. 414; *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183.

3. Petitioner's charge that the Attorney General is guilty of prejudgment (Pet. 14) is another facet of its argument that the administrative remedy is illusory. Similar claims of prejudgment have been rejected by this Court as a matter of law. Cf. *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 700–701; *National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U. S. 219, 236–237; *Fahey* v. *Mallonee,* 332 U. S. 245; *United States* v. *Morgan,* 313 U. S. 409, 420–421. In any event, the charge of prejudgment is also premature. Cf. *Marcello* v. *Bonds,* 349 U. S. 302; *Shaughnessy* v. *Accardi,* 349 U. S. 280; *Federal Trade Comm'n* v. *Cement Institute, supra.* Implicit in these cases is the principle that decision upon alleged prejudgment must await exhaustion of the administrative remedy. As the Court stated in *Yakus* v. *United States,* 321 U. S. at 434, "[i]n the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by 'loading the record against them' or denying such hearing as the Constitution prescribes."

4. Finally, petitioner argues that it will be irreparably injured by continuation of the administrative process. However, the injuries of which

it complains—the expense of the proceeding and the alleged damage to its reputation with resulting loss of membership, contributions and public acceptance—are common to any litigation, are not peculiar to administrative proceedings, and hence are "part of the social burden of living under government." *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. at 540.[9] Petitioner asserts that it is entitled to special consideration because it is a bar association. But one would suppose to the contrary that the maxim "equal justice under law" was particularly applicable to a bar association. Cf. *Associated Press* v. *United States*, 326 U. S. 1, 6–7.

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[9] The interrogatories of which petitioner complains are, as the court below specifically noted, subject to further administrative modification and revision. As that court stated (Pet. 31):

"* * * the proper place to test these interrogatories in the first instance is before the administrative body. We cannot anticipate the administrative action, if such a step were taken, any more than we can anticipate the outcome of the proceeding itself. Some modifications have already been made, and we cannot now say that others will not be made if specific application is made."

Furthermore, the filing of an answer to the interrogatories would not preclude subsequent judicial review and relief in the event that petitioner is ultimately designated at the conclusion of the administrative proceedings. For example, the interrogatories and the reply thereto might be stricken from the administrative record.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1955.

APPENDIX

Executive Orders and Regulations Involved

A. *Pertinent provisions of Executive Order 10450 of April 27, 1953, 18 F. R. 2489, 3 C. F. R. (1953 Supp.)*

SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

Whereas the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

Whereas the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U. S. C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U. S. C. 632, *et seq.*); section 9A of the act of

August 2, 1939, 53 Stat. 1148 (5 U. S. C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U. S. C. 22–1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * * * *

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

* * * * *

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of

the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

* * * * *

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under

the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

* * * * *

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency. [Section 11 is not here pertinent.]

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

* * * * *

SEC. 15. This order shall become effective thirty days after the date hereof.

B. *Provisions of Paragraph 3 of Part III of Executive Order 9835 of March 21, 1947, 12 F. R. 1935, 1938, 3 C. F. R. (1947 Supp.)*

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

C. *Provisions of The Attorney General's Rules of Procedure for the Federal Employee Security Program—Department of Justice Regulations of April 29, 1953, 18 F. R. 2619, 28 C. F. R. (1955 Supp.), Part 41*

DESIGNATION OF ORGANIZATIONS IN CONNECTION WITH THE FEDERAL EMPLOYEE SECURITY PROGRAM

By virtue of the authority vested in the Attorney General by section 22 of Title 5 of the United States Code, and by Executive Order No. 9835 of March 21, 1947, and Executive Order No. 10450 of April 27, 1953, I hereby prescribe the following rules of procedure with respect to notice, hearing,

and designation of organizations in connection with the Federal employee security program:

Sec.

41.1 Notice to and by organizations
41.2 Statement and interrogatories by Attorney General
41.3 Reply by organization
41.4 Request for hearing
41.5 Notice of hearing
41.6 Default
41.7 Hearing board or officer
41.8 Hearing
41.9 Recording of testimony
41.10 Determination
41.11 Previous designations not affected

AUTHORITY: §§ 41.1 to 41.11 issued under R. S. 161; 5 U. S. C. 22, E. O. 9835, Mar. 21, 1947, 12 F. R. 1935; 3 CFR, 1947 Supp.; E. O. 10450, Apr. 27, 1953, [18] F. R. 2489 [3 CFR, 1953 Supp.].

§ 41.1 *Notice to and by organizations.* (a) Within ten days after the effective date of Executive Order No. 10450 of April 27, 1953, each organization which has been designated by the Attorney General pursuant to Paragraph 3 of Part III of Executive Order No. 9835 of March 21, 1947, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it contests such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such designation.

(b) Whenever the Attorney General after appropriate investigation proposes to designate an organization pursuant to Executive Order No. 9835 or Executive Order No. 10450, or both, notice of such proposed designation shall be sent by reg-

istered mail to such organization at its last known address. If the registered notice is delivered, the organization, within ten days following its receipt or ten days following the effective date of Executive Order No. 10450, whichever shall be later, may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. If the notice of proposed designation is not delivered and is returned by the Post Office Department, the Attorney General shall cause such notice to be published in the FEDERAL REGISTER, supplemented by such additional notice as the Attorney General may deem appropriate. Within thirty days following such publication in the FEDERAL REGISTER, such organization may file with the Attorney General, Department of Justice, Washington, D. C., a written notice that it desires to contest such designation. Failure to file a notice of contest within such period shall be deemed an acquiescence in such proposed action, and the Attorney General may thereupon after appropriate determination designate such organization and publish such designation in the FEDERAL REGISTER.

(c) The notice of contest provided in this part shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of the organization which desires to contest such designation or proposed designation.

§ 41.2 *Statement and interrogatories by Attorney General.* Within sixty days following receipt of a notice of contest, the Attorney General shall cause to be forwarded to the organization by registered mail a statement of the grounds upon

which the designation was or is proposed to be made and written interrogatories with respect thereto. In the case of organizations designated pursuant to Paragraph 3, Part III of Executive Order No. 9835, such statement may include information obtained since the designation.

§ 41.3 *Reply by organization.* The organization, within sixty days following receipt of such statement and interrogatories, may file a verified reply which shall be signed by the executive officers (or persons performing the ordinary and usual duties of executive officers) of such organization. The reply shall answer each interrogatory completely and with particularity and shall be limited to statements of fact. The organization may also submit supporting affidavits with its reply. Failure to answer any interrogatory or any part thereof shall be deemed an admission of the truth of the facts to which such interrogatory or part thereof refers. The submission of an evasive reply to any interrogatory or any part thereof shall likewise be deemed an admission of the facts to which such interrogatory or part thereof refers. Failure of the organization to file a reply within the sixty days provided therefor shall constitute an acquiescence in designation.

§ 41.4 *Request for hearing.* Any organization filing a reply as provided in this part may accompany its reply with a written request for a hearing. In the absence of such request, the Attorney General shall determine the matter on the basis of the information available to him and the reply of such organization.

§ 41.5 *Notice of hearing.* Upon receipt of a request as provided in § 41.4, the Attorney General will set a date and fix a place for hearing and notify the organization thereof by registered mail.

§ 41.6 *Default.* When an organization declines or fails to appear at any scheduled hearing, the Attorney General shall without further proceedings determine the matter on the basis of the information available to him and the reply of the organization.

§ 41.7 *Hearing board or officer.* For the purpose of conducting any hearing as provided in this part the Attorney General shall assign such officer or board as he shall deem necessary.

§ 41.8. *Hearing.* (a) If upon the basis of the statement, interrogatories, reply and affidavits (if any) submitted as provided in this part it appears to the board or hearing officer that a determination may appropriately be made without the taking of evidence, the proceeding may be conducted without the taking of such evidence.

(b) The Attorney General, at his election, may rely upon the statement of grounds upon which the designation was or is proposed to be made, or may introduce evidence in support thereof or supplemental thereto, or in rebuttal of any evidence received on behalf of the organization.

(c) Hearings before a board or officer shall be informal and shall be conducted in an orderly and impartial manner.

(d) An organization shall be entitled to appear by counsel or other representative of its own choice.

(e) Testimony shall be given under oath or affirmation.

(f) The ordinary rules of evidence need not be adhered to at the hearings but reasonable bounds shall be maintained as to relevancy, competency and materiality. Both the Attorney General and the organization may introduce such evidence as the board or officer may deem proper in the particular case. In the discretion of the board or officer, the affidavit of any witness may be received in lieu of his oral testimony.

(g) Whenever, in the judgment of the board or officer, the proposed testimony of any witness appears to be irrelevant, immaterial, cumulative, or repetitious, the board or officer may refuse to receive such testimony.

(h) All objections to the admission or exclusion of evidence or other rulings of the board or officer shall be limited to a concise statement of the reasons therefor and shall be made part of the record. Argument upon such objections may be limited in the discretion of the board or officer.

(i) The board or officer shall be authorized to receive as evidence on behalf of the Attorney General information or documentary material, in summary form or otherwise, without requiring disclosure of classified security information or the identity of confidential informants.

(j) Witnesses testifying before the officer or board shall be subject to cross-examination, provided that no witness on behalf of the Government shall be required to disclose classified security information or the identity of confidential informants.

(k) If in the course of a hearing any witness or other participant is guilty of misbehavior which obstructs the hearing, such person may be excluded from further participation in the hearing.

§ 41.9 *Recording of testimony.* The testimony and proceedings at the hearing shall be recorded and transcribed by a person or persons designated by the Attorney General and made a part of the record. The organization, by its counsel or authorized representative, shall be entitled to inspect the transcript, and, upon request and at its cost, shall be furnished a copy thereof.

§ 41.10 *Determination.* Within a reasonable time following completion of any proceeding hereunder, the Attorney General shall make a determination on the record which shall include the statement of the grounds, interrogatories, replies to the interrogatories, affidavits, and testimony elicited at the hearing and other documents and papers filed in the proceeding, and shall notify the organization of the determination by registered mail. In making his determination the Attorney General shall take into consideration any handicap imposed upon an organization by the non-disclosures to it of classified security information or the identity of confidential informants and by reason of the lack of opportunity to cross-examine confidential informants.

§ 41.11 *Previous designations not affected.* The promulgation of the rules of procedure contained in this part shall not be deemed a revocation of any designation made by the Attorney General pursuant to Paragraph 3, Part III of Executive Order No. 9835, but each such designation shall continue in effect unless the administrative process herein provided is invoked by the organization affected and upon completion thereof a contrary determination is made by the Attorney General as to such organization.

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 496

NATIONAL LAWYERS GUILD,

Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Nothing contained in respondent's brief touches on the importance of a decision by this Court on the issue of exhaustion of administrative remedies here presented. No one can question the soundness of that doctrine as a general rule of judicial administration. However, it seems incredible that it should be available as a cloak under which administrative tyranny might proceed without judicial scrutiny. Here, in addition to the fundamental issue of the power to list, the case presents three reasons which render the exhaustion doctrine inapplicable—surely they present substantial questions for this Court's consideration. At the risk of repeating some of what we have said in our petition, we submit the following:

a. Has respondent the right to proceed by interrogatories, especially interrogatories of the character here presented, which are designed to induce default and invade privacy? Unless petitioner can make that challenge now it will never be able to make it effectively, for it will have to

answer the interrogatories or be listed by default—as indeed, as respondent will admit, has happened in the case of other organizations.

Where such a precondition is imposed as a prerequisite to obtaining administrative hearings, the doctrine of exhaustion cannot reasonably be applied. As a recent comment on the general question of exhaustion points out:

> "Granting that a final administrative decision ought normally to be required before a court will pass upon the question of interpretation, an administrative decision should not be a prerequisite to judicial action if the plaintiff's only means of getting an administrative decision is by risking the very result he is most interested in avoiding." (Kenneth Culp Davis, *Ripeness of Governmental Action for Judicial Review*, 68 Harv. L. R. 1122, 1326, at 1352).

b. Is the procedure consistent with due process, bearing in mind that the regulations contain provisions which, at the least, permit listing without even a hearing (Reg. 41.4. 8(a) Pet. p. 41)? And in this connection is it an answer to say that perhaps respondent will not exercise the power given by his own rules and assure due process? How, for instance, would petitioner ever know whether respondent had exercised the power (Reg. 41.8(i) Pet. p. 42) to act on undisclosed evidence?

c. Has respondent so prejudged the case as to disqualify himself? Must petitioner run the risk of being listed before it can have that issue determined? And if that cannot be passed on now it may be too late.

To all these problems respondent answers only that petitioner's complaint is premature, because it may not be listed. That is no answer, for it ignores the situation which is likely to arise should it be listed. Certainly the doctrine of exhaustion has never been pressed as far as it has been here.

When a bar association which could not hope to survive a public and official branding as "subversive" finds itself in a situation in which basic First Amendment rights are gravely threatened, when it is confronted with administrative proceedings lacking all statutory authority, when to secure the doubtful privilege of an administrative hearing before a public official who, it charges, has publicly prejudged the outcome, it is required to answer interrogatories some of which have been characterized by the court below as "impossible of answer", surely it can say to this Court: The doctrine of "exhaustion" cannot be automatically applied. Its application in these circumstances presents a serious question for consideration by this Court.

1. We cannot tell, from the casual reference (Brief p. 3) to the statutes listed in the Executive Order, whether respondent claims that these authorize the listing process. If so, then clearly our contention that they do not brings this case within the rule of *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, so that that issue must be judicially determined before exhaustion of the administrative process is necessary. And if respondent does not claim that any of those statutes authorize the proceeding, then the courts are confronted with the classic occasion for judicial intervention: unauthorized executive action.

2. The cases cited (pp. 16, 17) do not support respondent. In each of them the Court held that the administrative proceeding was authorized by a statute. That some of the statutes made no provision for judicial review, or even for administrative hearings, is not the controlling factor. And the Ninth Circuit in *Parker* v. *Lester* (No. 14,081 decided October 26, 1955), has not interpreted this Court's position as does the Solicitor General.

In the *Parker* case the issue related to the procedures established for screening seamen under the Magnuson Act (50 USC 191, 192, 194). The Court held that the statute

authorized a screening program, but that the regulations issued by the Coast Guard under the statute denied seamen rights which were of the essence of due process. The Court held that it was not necessary for the seamen who challenged these regulations to exhaust their administrative remedies and issued an injunction restraining their enforcement.

Judge Pope discussed the exhaustion doctrine at length and accepted one of the basic contentions we have made in the case at bar, namely, that the doctrine of exhaustion of administrative remedies has application only where there is some statutory provision for judicial review after administrative action or some special tribunal has been established to deal with the subject (such as the Tax Court, in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, or the Emergency Court, in *Yakus* v. *United States*, 321 U. S. 414).

Judge Pope said:

> "When the nature of plaintiffs' action is considered, it is apparent that no rule relating to prior exhaustion of administrative remedies can deprive the court of authority to pass upon the issues here present. The doctrine of exhaustion of administrative remedies has application in certain types of cases, all of which are substantially different than that presented here. Where an action is brought to obtain a review by the court of an administrative order, as for instance, the judicial review authorized by the Administrative Procedure Act (Sec. 1009, Title 5 U. S. C. A.), or 'final agency action', and the remedy before the agency has not been concluded, of course the right to review has not arisen. The case is not 'ripe for review'. Cf. Federal Power Comm'n v. Edison Co., 304 U. S. 375. And where in connection with such an administrative proceeding Congress has provided that the remedy before the administrative body is exclusive and has created means for review or enforcement of the board's order in a court, the inference is unavoidable that the statutory procedure is exclusive and that trial of issues in the au-

thorized manner cannot be short-circuited through an independent action for injunction in the district court. Meyers v. Bethlehem Corp., 303 U. S. 41.

"Manifestly this is not such a case. The proceeding in the lower court was in no sense a proceeding designed to review administrative action. It cannot be, for the Magnuson Act, the executive order and the regulations contemplate no such review. Indeed, it is the position of the defendants, with which the trial court agreed, that the provisions of the Administrative Procedure Act, including its provisions for judicial review, have no application here." (Slip Opinion, pp. 6, 7.)

These observations all have direct application to the case at bar.

Judge Pope stressed, moreover, the fact that the constitutional validity of the regulations was under direct attack; that no facts were in issue, citing *Great Northern Ry. v. Merchants' Elevator Co.*, 259 U. S. 285 (Slip Opinion, p. 8). Here also that is the situation—leaving to one side the question of respondent's prejudgment which, if an issue of fact, could not be disposed of on summary judgment.

Judge Pope noted also that the administrative tribunal had no competence to pass on the questions of due process there raised. So, of course, respondent has no competence to pass on the challenge to the authority of the President.

It is true that Judge Pope sought to distinguish the case at bar (Slip Opinion, p. 10, note 11a, quoted in respondent's brief, p. 18, note 8) on the ground that the regulations before him were invalid on their face, whereas those promulgated by respondent were not necessarily so. Whether respondent's procedures, which petitioner challenges, are invalid on their face or not, there are at least two reasons why the principle of the *Parker* case applies here. In the first place, petitioner challenges respondent's right to require it to answer interrogatories—an issue that cannot depend on the conduct of the hearing to which it is pre-

requisite. In the second place, our chief challenge is to the validity of the proceeding itself, a proceeding not authorized by any statute, whereas in the *Parker* case there was such a statute. The conditions which there led the court to rule that administrative remedies need not be exhausted should apply *a fortiori*.

To that extent, therefore, there appears to be an inconsistency between the positions taken by the Ninth Circuit and the District of Columbia Circuit which should be resolved by this Court.

3. Respondent (Brief, pp. 15, 16) seeks to draw an inference from this Court's decisions in the *Joint Anti-Fascist* case (341 U. S. 123) and the *Adler* case (342 U. S. 485) that the issue of power to list has already been decided by this Court. It is impossible to understand the relevance of the *Adler* case in this context. For there the Court was considering a state statute which was narrowly confined both as to substance and procedures—only organizations found, after hearing, to advocate the overthrow of the government by force could be listed. Here we have no statute and no definition of "communist" or "subversive" which has legal content. Moreover, and more significantly, this Court was faced, in *Adler*, with a situation where no organization had been listed or threatened with listing. Noting that the statute afforded organizations full notice and hearing and opportunities for judicial review (including review of the basic question of constitutional power), the Court directed its attention solely to the question of whether, after an organization had been validly and constitutionally listed, a teacher who was found to be a member of it could validly be discharged. The Court did not have before it and so, of course, did not consider what objections an organization might raise on substantive or procedural grounds to prevent such listing and it certainly did not consider whether an organization threatened with listing could enjoin administrative procedures until the courts had had opportunity to consider the issues of power and procedure.

And surely no inference as to the validity of the listing procedure can be drawn from the fact that a majority of this Court in the *Joint Anti-Fascist* case took the view that the procedures for listing which were then before it were so clearly invalid that the Court need not *reach* the constitutional question of power. That is in line with the Court's traditional desire to avoid unnecessary decision of constitutional issues. Cf. *Peters* v. *Hobby*, 349 U. S. 331; *Neese* v. *Southern Railway Co.*, decided November 21, 1955.

Surely the time has come for this Court to pass on the power of any agency of government to wield this lethal blacklist weapon. The organizations which participated in the original case have found that it was not the remedies, but the organizations themselves that have been "exhausted". If this application is denied petitioner may suffer a like fate.

4. None of the cases cited by respondent on the subject of procedures (pp. 17, 18) dealt with any comparable situation. Nor does the argument even remotely deal with the right of respondent to condition a hearing on the furnishing of satisfactory answers to interrogatories. Respondent's reference (p. 20, fn. 9) to the comment of the court below on the question of modification of interrogatories comes with ill grace. For he is aware—as the court below may not have been—that the very questions which the court quoted to demonstrate that the questions were "difficult, if not impossible, of answer" and that modification should be made and probably would be if request were made to respondent were questions which petitioner had asked respondent to modify and which he *did* modify. It was the *modified* questions which the court considered. But the modification so made by respondent in the quoted questions consisted of such changes as the addition of the words "To your knowledge" in question No. 60 (originally 61) and the deletion of the adverb "ever" and the substitution of the words "since 1946" in question No. 64 (originally 66): "Has the NLG or any of the * * * chapters thereof, passed

an anti-Communist or anti-Soviet resolution since 1946" (cf. I 62, 63 with II 64, 65).

5. Respondent is not correct in stating (p. 19) that this Court has ever dealt with the issue of prejudgment as here presented. In most of the cases cited nothing more was claimed than general statements of opinion, not directed at the particular litigant. And in *Fahey* v. *Mallonee* (332 U. S. 245) this Court expressly refrained from passing on the charge of malice which had not been determined below; it left that issue open. Here, moreover, the record compels the conclusion that prejudgment has been established; certainly the claim is not premature. At the very least petitioner was entitled to have the issue determined at a trial and not disposed of on summary judgment.

6. Finally respondent chides petitioner (p. 20) for its supposed disregard of equal justice in seeking "special consideration" as a bar association. We think it is fundamental to the concept of "equal justice" that each case be decided on the facts relevant to it. Not only petitioner but the public as well will suffer from respondent's proposed listing precisely because of petitioner's status as a bar association, an organization of attorneys dedicated to the protection of public rights. It is for this broader reason of concern to the public that this Court should give consideration to the fact that petitioner is a bar association.

CONCLUSION *

Substantial issues of public importance are here presented which call for the exercise of this Court's power to review. The petition should be granted.

Respectfully submitted,

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* In amplification of the material submitted with our petition (Appendix C, pp. 44, 49) we call the Court's attention to testimony given on the same subject on November 17, 1955 before the Senate Subcommittee on Constitutional Rights (see New York Times, Nov. 18, 1955, p. 19, col. 4).

The Times said: "An incomplete check by the legislative reference bureau of the Library of Congress showed that at least thirteen states, the District of Columbia, Hawaii and four cities had decreed that members of the organizations listed were subject to suspicion as enemies of the country."

FILED
MAY 23 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

No. 496

NATIONAL LAWYERS GUILD,

Petitioner,

v.

HERBERT BROWNELL, JR., Attorney General of the United States.

PETITION FOR REHEARING

The National Lawyers Guild petitions for a rehearing of the order denying its petition for certiorari entered May 7, 1956, Justices Black and Douglas noting their dissent.

We respectfully call to the attention of Justices Reed, Minton, and Clark that denial of certiorari appears inconsistent with their dissenting opinion in *Communist Party v. Subversive Activities Control Board,* No. 48 this Term, decided on April 30, 1956, after the petition for certiorari was filed herein. That dissenting opinion objected to returning a case for further proceedings "to a Board whose very existence is challenged on constitutional grounds." It was objected that, "We are asking the Board to pass on the credibility of witnesses after we have refused to say whether it has the power to do so."

In view of the importance and substantial nature of the questions relating to the constitutional power of the At-

torney General to list organizations as "subversive," etc., we assume that certiorari was denied in the case at bar on the ground of the decision below, namely, that petitioner must exhaust its administrative remedy of a hearing before the Attorney General. But we have also "challenged on constitutional grounds" the right of the Attorney General to list organizations and also his right to proceed by way of interrogatories. Thus we have challenged the constitutional existence of the Attorney General as an arbiter of organizations, just as much as the Communist Party challenged the right of the Subversive Activities Control Board to be such an arbiter.

Nor would granting the petition be inconsistent with the majority opinion in the Communist Party case since here too the "untainted administration of justice" and "fastidious regard for the honor of the administration of justice" suggests that the petitioner should not be required to undergo the ordeal of a pre-adjudged proceeding conducted under rules calculated to result in almost certain death.

Respectfully submitted,

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Robert W. Kenny,
Earl B. Dickerson,
Joseph Forer,
Attorneys for Petitioner.

Certificate

I certify that this petition is presented in good faith and not for delay and is restricted to an intervening circumstance considered by counsel to be of substantial effect.

May 25, 1956.

OSMOND K. FRAENKEL.

IN THE

Supreme Court of the United States

October Term, 1965

No. 1106

NATIONAL LAWYERS GUILD,

Petitioner,

vs.

Ramsey Clark, Jr., Attorney General of the United States,

Respondent.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term, 1955

No. .....

NATIONAL LAWYERS GUILD,

Petitioner,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Respondent.

PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The undersigned are members of the California bar. We are profoundly concerned with the effects upon an independent bar of the action proposed against the National Lawyers Guild by the Attorney General.

Involved are not simply questions dealing with the preservation of freedoms guaranteed in the Bill of Rights, but also the freedom of lawyers to discharge their professional responsibilities to clients and to associate together in societies pursuing legitimate professional interests. An examination of the petition for writ of *certiorari* filed herein indicates that the latter question has not been adequately covered by the parties.

We ask leave to file this brief as Friends of the Court so that the question may be presented to the Court. In our view the proper consideration of this question alone would justify the issuance of the writ.

The signers of this brief are members of the Bar of the State of California who believe that good government and a free nation cannot exist without a free and independent Bar. None of us is a member of the National Lawyers Guild. We are gravely concerned that the position of the Attorney General in respect of the Guild menaces the independence of the profession.

The Proposed Grounds for Designation.

As we apprehend the grounds for the proposed designation of the Guild, they consist of these: that the Guild's position in public debate and before the legislatures of the land on questions involving political and civil rights parallels that of the Communist Party; that some members of the Guild have opposed the Attorney General in litigation involving persons and organizations holding unpopular political views; that some members and leaders of the Guild are Communists or "fellow travelers"; and that the Guild has appeared *amicus curiae* opposing the Attorney General in the courts. We understand that upon such grounds the Attorney General proposes to designate as subversive a bar association that has carried on its activities on a national basis for nearly 20 years. We deem it natural to suppose (as did this Court in *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123) that so to denominate any organization that owes its life to the good will and support of citizens will effect its destruction—the more so when the organization is made up of lawyers whose very professional status is so intimately related to the public welfare.

The Lawyer's Right to Associate in Professional Societies.

One may well ask upon what authority an appointive officer of the federal government essays to offer judgment upon any bar association in the area of opinion and belief. Traditionally, the right of lawyers to associate in professional societies has not turned upon governmental approval of the views of its members or the activities of their society. The grounds of the Attorney General's action pertain largely to the positions advanced by the professional organization before the courts and legislatures of the land. Whatever the merits of such positions, it can hardly be urged that to present them to the properly constituted organs of government threatens the security of the republic. On the contrary, our institutions are bottomed upon the premise that the freedom of lawyers to advocate such views as their reason and legal training commend to them is the bedrock of individual liberty. Experience demonstrates that there is an essential inter-connection between an independent bar and a free people. Neither will survive when the lawyer's freedom to associate is made dependent upon government approval of the clients he represents or the ideas he espouses in public debate.

A Free and Independent Bar.

By "a free and independent bar" we do not mean to imply any special privileges for lawyers. Nor do we suggest that lawyers may be free to flout the laws to which their fellow citizens are subject.

It is the sworn duty of the lawyer to protect and defend the Constitution and the laws of the land. Correlative, we think, is the obligation of society to permit

the lawyer to arrive at his own concepts of right and justice and of what the law is or should be, and to carry out his duties as a lawyer without fear of governmental reprisal for lack of orthodoxy.

The Lawyer's Duties.

The essence of these obligations have been simply but eloquently expressed by Henry L. Stimson:[1]

> "Through many channels I came to learn and understand the noble history of the profession of the law. I came to realize that without a bar trained in the traditions of courage and loyalty our constitutional theories of individual liberty would cease to be a living reality. I learned of the experience of those many countries possessing constitutions and bills of rights similar to our own whose citizens had nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the writs of habeas corpus and certiorari. So I came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed."

Many of the signers of this brief disagree with many, if not all, of the positions taken by the Guild from time to time. But all of us believe whole heartedly in the *right* of the Guild to have taken and to have asserted vigor-

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[1]Henry L. Stimson—Introduction, page XXI—On Active Service in Peace and War—Stimson and Bundy.

ously whatever position it chose on matters of public interest before legislative committees, in the courts, at State Bar Conventions (as here in California) and in all media of open public discussion, free of the fear that any such expression might subsequently lay it open to a charge of subversion.

The lawyer's duties arise out of the fundamental rights of all others. Out of these duties arise rights of the lawyer which must be recognized as, in a sense, unique to him.

Representation of Clients.

One of the fundamental rights of all persons is to be represented by counsel if charged with a crime. The Chief Justice has recently—in considering the very principle with which we are here concerned—pointed out that this was more than a mere *pro forma* right but rather, the right to be "effectively" represented.[2] Out of this right, common to all, arises the concomitant duty of the lawyer to afford such representation and, out of that duty, *his right* to be free from the slightest stigma, obloquy, opprobrium or derogatory governmental action based in any way upon such representation.

The roots of the lawyer's duty in this respect go far back beyond even the existence of our nation, as does that tradition of "courage and independence" of the bar which afforded to everyone the right to be defended by counsel

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[2]"Does not the suspicion that has attached to lawyers who represent unpopular defendants indicate some departures from the constitutional principle that every person charged with crime is entitled to be effectively represented by counsel"—Address delivered February 19, 1955, at the opening assembly of Washington University's Second Century Convocation.

of his choice when charged with a crime, no matter how heinous or how offensive to the community. One of the classic examples in our history is, of course, the defense by John Adams and Josiah Quincy in 1770 of the British Soldiers charged with participating in the "Boston Massacre." Most apposite today are Adams' own words which in simple terms illuminate the depth of his conviction of the fundamental rights of the most hated of persons and the fundamental duty of the lawyer to protect those rights.

> "The next morning (after the night of the Boston Massacre), I think it was, sitting in my office, near the steps of the town-house stairs, Mr. Forrest came in, who was then called the Irish Infant. I had some acquaintance with him. With tears streaming from his eyes, he said, 'I am come with a very solemn message from a very unfortunate man, Captain Preston, in prison. He wishes for counsel, and can get none. I have waited on Mr. Quincy, who says he will engage, if you will give him your assistance; without it, he positively will not. Even Mr. Auchmuty declines, unless you will engage.' I had no hesitation in answering that counsel ought to be the very last thing that an accused person should want in a free county; that the bar ought, in my opinion, to be independent and impartial, at all times and in every circumstance, and that persons whose lives were at stake ought to have the counsel they preferred."[3]

It is inconceivable that those who wrote the Bill of Rights into our Constitution did not believe that this duty of the lawyer carried with it the right to be free of any harmful consequences or sanctions sought to be imposed

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[3]From John Adams' Autobiography—The Selected Writings of John Adams and John Quincy Adams, Edited by Koch and Peden, page 29.

upon him by government as a result of pursuing this duty, for it is so obvious as to need no laboring that the lawyer cannot effectively represent a defendant to the fullest of his ability if his efforts must be rendered under the shadow of possible future attainder.

The right of the lawyer to represent the meanest or most despised defendant, free of stigma and certainly free of governmental reprisal is perhaps one of the highest rights in our society. For it is a right which is not merely personal to the lawyers but one which he holds for the benefit of the entire community. And thus the state does not hesitate to charge him explicitly with this duty for the benefit of all its members.

The Right to Counsel.

In our own state all lawyers are bidden by express statutory commandment, "never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."[4]

The Board of Governors of the State Bar of California has recently vigorously reaffirmed the right and duty of the lawyers of this state to represent defendants in unpopular causes, pointing specifically to those charged with violation of the Smith Act.

> "The attention of the Board of Governors has been called to the fact that a number of lawyers, who might otherwise be willing to accept representation of defendants in Smith Act or similarly unpopular causes, are declining such representation because of the fear of economic consequences and personal stigma. It is well, therefore, to commend to the

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[4]California Business and Professions Code, Section 6068(h).

consideration of the lawyers of this State the declaration of principles recently adopted by the Conference of State Bar Delegates and which the Board hereby approves:

" 'RESOLVED that the Conference of State Bar Delegates recognizes that the right of counsel requires public acceptance of the correlative right of a lawyer to represent and defend, in accordance with the standards of ethics of the Bar, any client without having imputed to him his client's reputation, view or character.' "[5]

The American Bar Association has similarly stressed "the right of defendants to the benefit of assistance of counsel and the duty of the Bar to provide such aid even to the most unpopular defendants."[6] In its declaration of these principles the Association resolved that it would "continue to educate the profession and the public to the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause."[7]

To charge, therefore, that an association of lawyers is subversive because some of its members have appeared as counsel for Communists is nothing less than a command to the bar to disregard its solemn duty in this respect. Such a command, coming from an unofficial body, may be disregarded and presents no problem for this Court. But such a command, made under guise of governmental authority, is an unconstitutional invasion of the rights of lawyers and when appropriately challenged, as it has

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[5]Los Angeles Daily Journal, August 16, 1955.

[6]*Ibid.*

[7]*Ibid.*

been by the National Lawyers Guild, should be struck down promptly. Certainly it is a matter which this Court should consider and pass upon before lawyers are put to the task of justifying, under the cloud of a charge of subversion, the defense of anyone charged with crime.

Lawyers as Friends of the Court.

Equally with the duty of representing persons whose views are unpopular, our legal tradition gives members of the bar the right and imposes upon them the duty of presenting to the courts their views, not as advocates but as friends of the Court, when in their judgment problems important to the society as a whole or to a considerable portion of it are before the courts for decision. We would feel that tradition was being ignobly traduced if the presentation of our views in this brief were, at some future date, to be used as the basis of a charge of subversion against us or against any association of which we are members. More, this would be a clear-cut violation of our rights under the First Amendment. We cannot, therefore, look with equanimity—or with less concern than if we ourselves were parties—upon an action which seeks to declare a bar association subversive because it has filed *amicus curiae* briefs with the Courts in cases which it deemed to present problems important to the community at large. Whether or not we, ourselves, would consider it incumbent upon us to file such briefs in all or any of those cases or whether we would have taken the same positions as the Guild took does not concern us. It is likely that many of us might have differed considerably from many of the views expressed by the Guild in those briefs. But we are informed that in no case has any court ever suggested that any *amicus* brief filed by the Guild was filed in bad faith or in any fashion exceeded the bounds of

legal propriety. The right of the Guild and its members to file such briefs, free of the thought of future penalties, is an incontestable right possessed by every member of the Bar.

Let that right and that duty of those who are officers of the Courts be denied to a part of the Bar and the rights of the entire Bar are imperiled. This is more than merely a matter of what ought to be valid social policy—such a deprivation of lawyer's duties, is, we submit, prohibited by the Constitution.

Lawyers as Leaders in Society.

Equal, too, with these duties is the duty of the lawyer to give what leadership he can in the formulation of the laws under which we live. This duty may not be spelled out with the same measure of preciseness as the other duties to which we have adverted, but it is a fact that the lawyer has in our country traditionally led in the initiation of the laws of our land, in the public discussion and debate about the law and, to the great credit of the profession, in the opposition to unjust and oppressive laws. Of necessity, this is so because of the very nature of our profession. Lawyers, whose lives are spent in dealing with laws, are bound to be more concerned with the law at every stage—even before it becomes law—than any other group in the community.

Whether we turn to the writing of the Declaration of Independence, the fashioning of the Constitution, or the composition of state and national legislatures over our entire history, such great discussions of our laws as the Lincoln-Douglas debates, the leadership of the opposition to the iniquitous Alien and Sedition Laws, the solemn indignation and protest of some of the most conservative

members of the New York Bar over the expulsion of five Socialist members of the New York Legislature in 1920 or to countless other similar examples we find, no matter where we look in the pages of American history, the lawyer vigorously in the lead and actively participating in all matters involving our laws.

Thus, we are advised, the members of the National Lawyers Guild, through their association, have taken the frequently unpopular position on a variety of controversial issues. The nature of the positions it has taken represents one of the important grounds on which the Attorney General seeks to stigmatize the Guild and the thousands of lawyers who are still among its members as "subversive."

Here, too, we have not inquired specifically into the position which the Guild has taken on these and similar matters. And here, too, we assume that in some, if not many, instances they differ materially from the views which many of us may have on these matters. We assume, further, that on each, the position of the Guild is directly contrary to that of the Attorney General and his more recent predecessors in office. We do not need to point out that so, too, is the considered judicial opinion of members of this Court—in some instances, of the majority of this Court. In order to make clear our belief that no matter how diametrically opposed may be the views of any of us those of the Guild, we conceive it to be a gross and unwarranted invasion of the lawyer's rights under the First Amendment to seek to deprive him of the right to think as he will and to express freely his views, singly or in concert with his fellow lawyers, in any issue before the community, under pain of being officially branded as "subversive."

The Asserted Political Views and Associations of Some Guild Members and Leaders.

Concerning this we are informed that the Guild, unlike the Attorney General, makes no political inquiry of its members. Traditionally, this has been the practice of all bar associations. But irrespective of the merits of either the Guild's or the Attorney General's approach to this problem it would seem more nearly consonant with the spirit of our constitution to judge an organization, not by what some of its members have said and done, but by what as an organization, it has said or done.

It may have been true several thousand years ago that "Rare and happy are the times when we think what we please and express what we think,"[8] but the framers of our Constitution, fully cognizant of the rarity of such times under oppressive government sought by the Bill of Rights to ensure that such times should not be rare in this land but should exist always. "The men of our First Congress knew, as we may be in danger of forgetting, that each element in the Bill of Rights was a painfully won acquisition."[9]

It is not lightly that we have undertaken to set before this Court our views on the basic rights of lawyers in our society. We understand full well the responsibility which rests upon each of us, on an occasion like this. To use the words of John Adams[10] we know that in what we say there must be "no art or address, no sophistry or prevarication, in such a cause, nor anything more than

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[8]Tacitus, The History, Book I, 1.

[9]Mr. Chief Justice Warren, *op. cit.*

[10]John Adams, *op. cit., supra,* note 3.

fact, evidence and law would justify." We have, therefore, sought to weigh as carefully as we could each word which we have here set down, to avoid even the shadow of overstatement and to limit ourselves to an expression of such of our views on the very fundamental problem involved here which we feel may be of some help to this Court in the consideration of the issue before it.

Respectfully submitted,

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